90-1658

Supreme Court, U.S.
FILED
APR 29 1991
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No. 91-

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

HBA EAST LIMITED, ET AL.,
Petitioner

v.

JEA BOXING COMPANY, ET AL.,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS

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ATTORNEYS FOR PETITIONER

QUESTIONS PRESENTED

1. Is the failure to give notice of a default judgment hearing a violation of Defendant's right to due process under the Fourteenth Amendment to the United States Constitution once Defendant has made an appearance in the case?

2. Can the right to complain of a due process violation be waived prior to the time when the Texas Supreme Court, following a United States Supreme Court's decision, holds that the right to due process is available under the circumstances at issue?

3. Did Petitioners appear in the case?

LIST OF ALL PARTIES

Petitioners/Defendants are:

HBA East, Limited
HBA East, Inc.
Ring Network, Inc.
Ring Sports Promotions, Inc.
Round One Productions, Inc.
585 Stewart Avenue
Garden City, New York 11530

Jeffrey D. Levine
33 Ingold Drive
Dix Hills, New York 11746

There are no other parent companies or subsidiaries.

Respondents/Defendants are:

JEA Boxing Company, Inc.
Pinehill Investments, Inc., d/b/a
Houston Boxing Association
5005 Riverway, Suite 500
Houston, Texas 77056

There are no other parent companies or subsidiaries.

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No. 91-

HBA EAST LIMITED, ET AL,
Petitioners,

v.

JEA BOXING COMPANY, ET AL,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS

Petitioners, HBA East Limited, HBA East, Inc., Ring Network, Inc., Ring Sports Promotion, Inc., Round One Production, Inc., and Jeffrey D. Levine ("Levine") file this Petition for Writ of Certiorari to the Supreme Court of the State of Texas and ask this Court to vacate the judgment, render judgment for Petitioners on the questions presented, and remand the case to the trial court for a trial on the merits.

OPINIONS BELOW

The opinion of the Court of Appeals for the First Supreme Judicial District of Texas sitting in Houston, Texas, is reported at 796 S.W.2d 534. App. B. The Supreme Court of the State of Texas denied Petitioners' Application for Writ of Error, notating writ denied. App. A. The denial of Petitioners' Application is not officially reported. The judgment rendered by the trial court is not officially reported. App. C.

JURISDICTION

Petitioners' Application for Writ of Error was denied by the Supreme Court for the State of Texas on January 23, 1991. App. A. Respondents' Motion for Rehearing of Application for Writ of Error was overruled on February 20, 1991. App. D. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const. Amend. XIV, § 1:

> . . . no State shall make or enforce any law which shall abridge the privileges or amenities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; . . .

STATEMENT OF THE CASE

Respondents filed their Original Petition on March 3, 1987, seeking the dissolution of an alleged partnership with Petitioners, all rights and interest in the alleged partnership's assets, and actual and punitive damages. App. E.

All Petitioners had been served with the lawsuit by March 6, 1987. On March 27, 1987, before their answers were due in the Harris County District Court, HBA East, Inc., Round One Production, Inc., and Levine filed Petitions for Chapter 11 bankruptcy reorganization in the Eastern District of New York. (HBA East, Inc., Round One Production, Inc., and Levine will at times be referred to herein as the "Bankruptcy Petitioners", the other Petitioners will at times be referred to as the "Non-Bankruptcy Petitioners".) During the course of the bankruptcy proceedings, $175,000 was escrowed into the registry of the bankruptcy court by order of that court. On June 3, 1988, the bankruptcy judge dismissed Petitioners' Petition.

On June 27, 1988, Petitioners removed the Texas state action to federal court. App. F. The Honorable Lynn N. Hughes of the United States District Court of the Southern District of Texas, remanded the case to the Harris County District Court on June 30, 1988. App. G. Before signing the remand order, Judge Hughes directed that the $175,000 in escrow in New York be deposited in the registry of the federal court, which they were. Although a certified copy of Judge Hughes' remand order was filed with the Harris County District Clerk, Petitioners never received written notice that the remand order had been filed in Harris County.

At a hearing held on Saturday, April 1, 1989, the trial court rendered a default judgment against Petitioners, jointly and severally, for $2,215,595 in actual damages, $6,645,785 in punitive damages, and post-judgment interest. In addition, the judgment awarded Respondents the $175,000 plus interest which had been on deposit in the federal court registry, provided for the dissolution of the partnership upon which the underlying lawsuit was based, and awarded Respondents all rights and interest to

the partnership assets. App. C. The default judgment, approved by Respondents' counsel, correctly stated that Petitioners had appeared in the case. Even though they had made an appearance, Petitioners received no actual or constructive notice of the default judgment hearing and consequently were not represented at such hearing.

On April 28, 1989, Petitioners filed their Motion for New Trial, asserting that the default judgment was void because their answer was not yet due according to Texas Rule of Civil Procedure 237a when judgment was rendered. App. H. Rule 237a states that a defendant's answer is due 15 days after he receives notice of an order of remand. The trial court denied Petitioners' Motion for New Trial on May 10, 1989. App. I. On August 25, 1989, Petitioners filed their appeal bond and appellate brief with the court of appeals, asserting the same points of error they had raised in their Motion for New Trial. App. J. At the times the Motion for New Trial as well as the appellate brief were filed, the particular application of the constitutional right to due process upon which Petitioners premise this Petition had not yet been announced.

It was not until September 20, 1989, that the Texas Supreme Court decided *LBL Oil Company v. International Power Services, Inc.*, 777 S.W.2d 390 (Tex. 1989). *LBL Oil* was the first case in which the Texas Supreme Court applied *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80 (1988) to facts identical to those of the present case. The supreme court held that once a defendant has appeared in a cause, he is entitled to notice of a hearing on a motion for default judgment. The court stated that if such notice is not given, and a default judgment is entered, the defendant has been denied due process under the 14th Amendment to the federal constitution.

Prior to *LBL Oil* there had been no suggestion by the courts that the *Peralta* rights were applicable in

Petitioners' circumstance. Therefore, Petitioners were timely in initially raising their due process complaint, based on lack of notice of the default judgment hearing, in their Amended Brief For Appellants filed with the court of appeals on October 2, 1989. App. K.

Petitioners raised the federal question in their first point of error in their Amended Brief. App. K-8. That point of error stated:

> THE TRIAL [SIC] ERRED IN ENTERING A DEFAULT JUDGMENT FOR APPELLEES, AFTER APPELLANTS HAD APPEARED IN THE CASE, WITHOUT NOTICE TO APPELLANTS OF THE HEARING ON APPELLEES' MOTION FOR DEFAULT JUDGMENT, IN VIOLATION OF APPELLANTS' RIGHT TO DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION. (TR. 129-136)

However, the Court of Appeals found that the Non-Bankruptcy Petitioners had waived their constitutional complaints.[1] App. B. The Texas Supreme Court sanctioned that decision by denying Petitioners' Application for Writ of Error. App. A.

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1. The court of appeals affirmed the trial court's default judgment as to the Non-Bankruptcy Defendants and reversed and remanded that judgment as to the Bankruptcy Defendants. The court held that because the Bankruptcy Petitioners' answer was not yet due when the default judgment was rendered, the judgment was invalid as to them. The court therefore declined to address whether the Bankruptcy Petitioners had waived their constitutional rights as well. App. B. By denying writ, the Texas Supreme Court expressed approval for the court of appeals' decision. App. A.

REASONS FOR GRANTING THE WRIT

This Court has long held that "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under the circumstances, to apprise interested parties of the pendency of the action and to afford them the opportunity to present their objections." *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80, 99 (1988); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). The default judgment hearing at issue, at which the trial court granted final judgment against Petitioners for more than $8,000,000, was undoubtedly "accorded finality".

However, it was not until *LBL Oil* that the constitutional mandate of *Peralta* was applied to the precise situation at bar by the Texas Supreme Court. As a result of *LBL Oil*, it is clear that the opinion of the court of appeals and the Texas Supreme Court's affirmation of that opinion conflict with the decisions of this Court in *Peralta* and *Mullane* and, for that reason, should be reversed.

A. Respondents' Failure to Give Petitioners Notice of the Default Judgment Hearing Violated Petitioners' Fourteenth Amendment Due Process Rights.

Once a defendant has made an appearance in a cause, he is entitled to notice of the trial setting as a matter of due process under the Fourteenth Amendment to the Federal Constitution. At a minimum, the due process clause requires that deprivation of life, liberty, or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case. *Mullane v. Central Hanover Bank & Trust Co.* , 339 U.S. at 313.

Twelve days after the default judgment in question was rendered, Respondents filed not only a Request for Writ of Execution on Petitioners' property, but also an Affidavit for Immediate Execution, seeking expedition of the process. Apps. L and M, respectively. There can be no doubt that the hearing on Respondent's Motion for Default Judgment in this case, in which a judgment of more than eight million dollars was rendered against Petitioners, was a proceeding in which Petitioners were deprived of property rights. Therefore, ". . . notice and hearing must [have] measure[d] up to the standard of due process." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. at 313. Because Petitioners received no notice whatsoever of the hearing, the standards of due process were not met.

In *Peralta v. Heights Med. Center, Inc.*, 485 U.S. at 99, this Court reiterated the basic premise of the due process clause when it stated, "failure to give notice violates 'the most rudimentary demands of due process of law.'" The facts in *Peralta* were, however, different from the situation with which the Petitioners here were faced. In *Peralta*, this Court held that the rendition of a default judgment violated a defendant's right to due process when the defendant was never personally served with the lawsuit and when he had not appeared before the trial court. The Court held that, under those circumstances, the defendant was not required to show a meritorious defense in order to obtain a new trial.

In *Lopez v. Lopez*, 757 S.W.2d 721 (Tex. 1988), the Texas Supreme Court applied *Peralta* to circumstances differing both from the *Peralta* facts, as well as the facts of the case at bar. In *Lopez*, the defendant had both appeared and answered. The Texas Supreme Court held under those circumstances that the defendant had a constitutional right to notice of a trial regardless of whether he could demonstrate a meritorious defense.

For the first time, in *LBL Oil*, the Texas Supreme Court considered facts which were virtually identical to the facts in this instance and found that the basic premise of *Peralta* applied. The *LBL Oil* court cited *Peralta* in holding that "Once a defendant has made an appearance in a cause, he is entitled to notice of the trial setting as a matter of due process under the Fourteenth Amendment to the Federal Constitution." *LBL Oil Co. v. International Power Services, Inc.*, 777 S.W.2d at 390-391.

The court stated that a hearing on a motion for default judgment was the equivalent of a trial setting in that it is dispositive of the case. This holding comports with this Court's ruling in *Mullane* that due process requires notice of any proceeding which is to be accorded finality. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. at 314. Clearly, the rulings in *Peralta* and *Mullane*, as applied for the first time to the present situation in *LBL Oil*, are controlling and dictate that Petitioner's due process rights were abridged when they were given no notice of the hearing on Respondent's Motion for Default Judgment. For that reason, the judgment in this case must be set aside and the case remanded to the trial court.

B. There Has Been No Waiver of Petitioners' Constitutional Right to Notice of the Default Judgment Hearing.

Petitioners first asserted their constitutional right to notice of the default judgment hearing in their amended brief. That was the earliest possible point at which it was conceivably reasonable to do so. *LBL Oil* was the first case to apply the ruling of this Court in *Peralta* to circumstances wherein a defendant has appeared but is given no notice of a hearing on a motion for default judgment, and judgment is rendered against him at the hearing. Those are the precise facts of Petitioners' case. The *LBL Oil* decision was rendered subsequent to the time that the Motion for New Trial in this case had been denied and the time that Petitioners' brief was due to the court of appeals. Thus, it is incredulous for Respondents to claim that the Petitioners waived their right to due process by failing to assert their constitutional objections at either of those times.

It has been a basic premise of this Court for decades that "A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458 (1937). Petitioners could not have waived their right to complain of due process violations based on lack of notice of the default judgment hearing prior to the time that that right was enunciated in *LBL Oil*.

In addressing a waiver argument similar to the one put forth by Respondents before the court of appeals, this Court has held that a party against whom relinquishment of a constitutional right is asserted will not be required to have foreseen the pronouncement of a constitutional right by the courts. *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967) (in which this Court rejected a contention that the

party who was alleged to have waived his constitutional right should have seen "the handwriting on the wall.").

This Court has further held steadfast to the premise that "courts indulge every reasonable presumption against waiver of fundamental constitutional rights." *Johnson v. Zerbst*, 304 U.S. at 464. This is particularly true when the constitutional points were "raised early enough so that this Court has had the benefit of some ventilation of them by the courts below." *Curtis Publishing Co. v. Butts*, 388 U.S. at 144. In this instance, Petitioners raised their constitutional claims at the earliest possible opportunity. That timing was sufficient to allow the court of appeals to consider the salient points. The court of appeals and state supreme court had the occasion to determine that Petitioners' constitutional right to due process had been violated and did not do so. This Court should now properly uphold those rights.

C. Petitioners Appeared in the Cause.

Respondents have attempted to convince the appellate courts below that Petitioners made no appearance in this case.[2] Such contentions are absurd given the fact that the default judgment, approved by Respondents' counsel, recited that "Defendants, [Petitioners here] although having made an appearance in this action, failed to answer this action." App. C. Respondents are bound by the findings of the trial court because Respondents failed to object to the finding and failed to appeal that aspect of the judgment. Once the trial court lost jurisdiction, the recital, even if it were erroneous, could not be cured by a nunc pro tunc proceeding. *Stock v. Stock*, 702 S.W.2d 713 (Tex. App.- -

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2. Neither the court of appeals nor the supreme court addressed this issue even though Petitioners had thoroughly briefed the point to both courts.

San Antonio 1985, no writ); *Finley v. Jones*, 435 S.W.2d 136 (Tex. 1969). Furthermore, the record demonstrates that Petitioners did, in fact, appear.

For example, the law firm of Kaye, Scholer, Fierman, Hays & Handler, representing at least three of the Petitioners, filed a letter dated June 14, 1988 with the Harris County District Clerk. App. N. In that letter, Petitioners' lawyers requested several things of the trial court on behalf of HBA East, Inc., Round One Productions, Inc. and Jeffrey Levine, who had filed a Chapter 11 bankruptcy proceeding in New York. Counsel asked that in the event the New York bankruptcy court determined not to transfer the adversary proceeding filed therein, identical to the proceeding filed before the trial court, to a New York federal district court, the letter be deemed to be a request for the removal of the proceeding before the trial court to the Texas federal court. The letter further requested that all pleadings which had been filed in the adversary proceeding before the bankruptcy court, "including the answer," be deemed the duly filed pleadings of the parties in the trial court. Defendants' counsel further requested "that there . . . be a prompt adjudication of the underlying claims asserted by the parties hereto" and specifically asked the trial court to apprise them of the approaches it deemed advisable "in order to achieve . . . the foregoing action."

Additionally, Defendants appeared in this case while it was pending in federal court in response to a motion for contempt and sanctions before the trial court signed its judgment. In fact, Judge Hughes, the federal district judge, stated in a hearing on July 8, 1988 that Mr. Steinberg of the Kaye, Scholer firm made an appearance for Petitioners on June 29, 1988 by participating in a motion hearing by telephone. App. O. At that same hearing, Mr. Montague, Respondents' counsel, agreed with Judge Hughes and further added:

> Mr. Steinberg made an appearance before this Court, Your Honor, and it is absolutely absurd for Mr. Caddell to come in here and try to represent to this court that Mr. Steinberg made no appearance. He was on the pleadings. He talked to you on the telephone about the case in [sic] his representation to [sic] the Defendants. I was sitting in the room when you talked to him.

App. O.

Not only did Mr. Steinberg make an appearance on behalf of Petitioners, but there can also be no doubt that Mr. Caddell, Petitioners' Texas counsel, did as well. To begin with, Mr. Caddell appeared in person at the July 8 hearing. App. O. Secondly, he signed and filed a response to Plaintiffs' Order to Show Cause and attended the hearing on the matter. App. P. Finally, Mr. Caddell noted at that hearing that he had previously spoken to Judge Salazar about a hearing in state court. App. O.

A general appearance is entered whenever the defendant invokes the judgment of the trial court in any way on any question other than that of the court's jurisdiction, without being compelled to do so by previous rulings of the court sustaining the jurisdiction. *Toler v. Travis County Child Welfare Unit*, 520 S.W.2d 834, 836 (Tex. Civ. App.--Austin 1975, writ ref'd n.r.e.); *Smith v. Amarillo Hospital District*, 672 S.W.2d 615 (Tex. App.--Amarillo 1984, no writ). This is true not only in the courts of Texas but also in both state and federal jurisdictions throughout the United States. *Trust Co. Bank v. Tingen-Millford Drapery Co.*, 119 F.R.D. 21 (D.N.C. 1987); *Cactus Pipe & Supply v. M/V Montnartre*, 756 F.2d 1103, 1108 (5th Cir. 1985); *Ragnone v. Wirsing*, 367 N.W.2d 369, 370 (Mich. Ct. App.1985); *Hutchinson v. Brotner-Sherman*

Theatres, Inc., 419 N.E.2d 530, 538 (Ill. Ct. App. 1981); *Iffland Lumber Co. v. Tucker*, 368 A.2d 606, 608-9 (Conn. 1976); *Barber v. Calder*, 522 P.2d 700, 702 Fn. 4 (Utah 1974); *Resident Advisory Board v. Tate*, 329 F.Supp. 427, 430 (D.C. Pa. 1971).

Moreover, even if a defendant attempts to make a special appearance to contest the court's jurisdiction, but does so incorrectly, the defendant will be deemed to have made a general appearance. *Slater v. Metro Nissan of Montclair*, 801 S.W.2d 253 (Tex. App.--Fort Worth 1990, writ denied); *Barber v. Calder*, 522 P.2d at 702, Fn. 4; *Kulbeth v. Woolnought*, 324 F.Supp. 908, 911 (S.D. Tex. 1971). Clearly, according to the facts, and under the law of Texas and numerous other jurisdictions, Petitioners appeared in this case.

Finally, Mr. Montague's certificate of service, demonstrating further his belief that Petitioners had appeared in the case, shows that both Mr. Caddell and Mr. Steinberg were furnished with copies of Plaintiffs' First Amended Petition filed by Mr. Montague in state court before the hearing on the motion for default. App. Q. Although Respondents' counsel had provided Petitioners with notice of all previous hearings and copies of pleadings, he deliberately failed to provide Petitioners with copies of the motion for default judgment or with notice of the hearing set for Saturday, April 1, 1989 on that motion. Consequently, Petitioners were deprived of their constitutional rights under the Fourteenth Amendment to have notice of the hearing so that they could attend and defend themselves. There can be no clearer violation of the constitutional right to due process of law.

CONCLUSION

Petitioners appeared in this case. Having done so, they were entitled to, but did not receive, notice of the

hearing at which a multi-million dollar default judgment was rendered against them. Clearly, Petitioners' due process rights were violated.

Furthermore, Petitioners diligently asserted their constitutional complaints in a timely manner, and thus, did not waive their right to due process. The default judgment against Petitioners should be vacated and the case remanded to the trial court for a full trial on the merits.

Respectfully submitted,

BUTLER & BINION

By:_____

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APPENDICES

APPENDIX A

THE SUPREME COURT OF TEXAS
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John T. Adams, Clerk

January 23, 1991

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RE: Case No. D-0436

Style: HBA EAST, LTD. ET AL.
v. JEA BOXING COMPANY, INC. ET AL.

Dear Counsel:

Both applications for writ of error in the above referenced case were this day denied with the notation, Writ Denied.

Sincerely,

John T. Adams, Clerk

by /s/ Blanca Morin, Deputy

APPENDIX B

OPINION
IN THE
COURT OF APPEALS
FOR THE
FIRST DISTRICT OF TEXAS

NO. 01 -89-00557-CV

HBA EAST, LTD., A TEXAS LIMITED PARTNERSHIP, HBA EAST, INC., RING NETWORK, INC., RING SPORTS PROMOTIONS, INC., ROUND ONE PRODUCTIONS, INC., and JEFFREY D. LEVINE, Appellants

V.

JEA BOXING COMPANY, INC. and PINE HILL INVESTMENTS, INC., D/B/A/ HOUSTON BOXING ASSOCIATION, Appellees

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On Appeal from the 157th District Court
Harris County, Texas
Trial Court Cause No. 87-10167

This is an appeal from a no answer default judgment. We affirm in part and reverse in part.

The defendants and appellants are MBA East, Ltd.; HBA East, Inc.; Ring Network, Inc.; Ring Sports

Promotions, Inc.; Round One Productions, Inc.; and Jeffrey D. Levine. MBA East, Ltd. is a Texas limited partnership. All the other defendants are New York residents that do business in Texas. The plaintiffs and appellees are JEA Boxing Company, Inc. and Pine Hill Investments, Inc., doing business as the Houston Boxing Association.

In 1984, the plaintiffs and defendants formed a limited partnership in Texas, MBA East, Ltd., to promote boxing events. MBA East, Inc. became the managing partner of MBA East, Ltd.

The plaintiffs filed suit in Texas state court on March 3, 1987, alleging that Jeffrey Levine used MBA East, Inc., as his alter ego, to manipulate MBA East, Ltd. and that Levine, through MBA East, Inc., breached his contractual agreement with the plaintiffs by refusing to make accountings. They also claim Levine breached his fiduciary duty to them by self-dealing. The defendants undertook a series of legal maneuvers, including the filing of bankruptcy petitions by some of them and the filing for removal from Texas state court to federal district court. They did not file answers in the state court proceeding until May 10, 1989. Meanwhile, the plaintiffs sought, and were granted on April 1,1989, a default judgment against the defendants.

On appeal, the defendants assert that the trial court erred in: (1) entering a default judgment against them after they had appeared without notice to them of the hearing on the plaintiffs' motion for default judgment; (2) entering a default judgment against them before their answer was due under TEX. R. Civ. P. 237a; and (3) ordering the district clerk to release funds from the court's registry to the plaintiffs.

The following dates are procedurally significant:

1987 March 3 — The plaintiffs filed suit in Texas state court.

March 5 — MBA East, Inc. was served.

March 6 — MBA East, Ltd., Ring Network, Ring Sports Promotions, Round One Productions, and Jeffrey Levine were served.

March 27 — MBA East, Inc., Jeffrey Levine, and Round One Productions filed petitions for chapter 11 bankruptcy in New York.

March 30 — The answer deadline in the Texas state court suit.

1988 June 3 — The New York bankruptcy court dismissed the bankruptcy suit.

June 27 — All the defendants filed petitions for removal from Texas state court to federal district court in Texas.

June 29 — The defendants attended the hearing on remand in federal district court; the court announced it would remand the case to Texas state court.

June 30 — Federal district court remanded the case to Texas state court.

June 30 — The clerk of federal district court notified parties of the remand order.

June 30— The defendants filed suit in New York state court.

July 8 — Federal district court in Texas held a hearing on contempt motion; at the hearing, the defendants' attorney acknowledged that the defendants knew of the remand.

July 19 — The defendants received another notice of the remand: A copy of the letter sent to Texas state court about the remanded case and funds in the registry of federal district court in Texas.

November 4 — The New York state court dismissed its case and acknowledged the case pending in Texas state court.

1989 March 29 — In Texas, the federal district court's order of remand was filed in the Harris County District Clerk's office.

April 1 — Texas state court entered a default judgment against all the defendants.

April 10 — Texas state court ordered the clerk to pay all funds in the registry to the plaintiffs.

April 28 — The defendants filed a motion for new trial in Texas state court.

May 10 — All the defendants filed their original answers in Texas state court.

May 10 — Texas state court denied the motion for new trial.

In considering the defendants' second point of error, we note that there is a distinction between those who filed for bankruptcy and those who did not.

Ring Network, Ring Sports Promotions, and HBA East, Ltd. (the nonbankruptcy defendants) did not file for bankruptcy. Therefore, they did not have the benefit of the automatic stay afforded debtors who file petitions under the federal bankruptcy laws. *See* 11 U.S.C.S. sec. 362 (Law. Co-op. 1985 & Supp. 1990). The answer date for the nonbankruptcy defendants in the Texas state court suit, therefore, was the first Monday following the expiration of 20 days after service of citation, or March 30, 1987. TEX. R. CIV. P. 99(c), 237. The answers filed by the nonbankruptcy defendants on May 10, 1989, were over two years too late. Moreover, the deadline for their answer expired before they filed their petition for removal to federal court, so they are unable to use TEX. R. CIV. P. 237a to extend their answer deadline.

We overrule the second point of error with respect to the nonbankruptcy defendants.

HBA East, Inc., Levine, and Round One Productions (the bankruptcy defendants) filed for bankruptcy in New York three days before their answer date in the Texas state court suit. The bankruptcy filings resulted in an automatic stay for the bankruptcy defendants, and their time to file answers in the state lawsuit was tolled until the bankruptcy cases were dismissed or closed. *See* 11 U.S.C.S. sec. 362 (c)(2)(A), (B) (Law. Co-op. 1985).

After conducting extensive hearings, the bankruptcy court in New York, on June 3, 1988, dismissed the defendants' bankruptcy as brought in bad faith. The bankruptcy defendants' time to answer resumed 30 days after June 3, 1988, or on July 3, 1988. *See Howard v. Howard*, 670 S.W.2d 737, 739 (Tex. App. San Antonio 1984, no writ); 11 U.S.C.S. sec. 108 (c) (Law. Co-op. 1985 & Supp. 1990). Therefore, the new answer date for the bankruptcy defendants in the Texas state court suit was July 6, 1988.

On June 27, 1988, all the defendants filed a petition for removal of the Texas state court suit to federal district court. On June 29, the federal court announced that it was going to remand the case to Texas state court. The court also ordered the $175,000, which was escrowed in the bankruptcy court in New York, to be deposited with the federal district court until the case was remanded to Texas state court. On June 30,1988, the federal district court signed a remand order. The clerk of the federal district court furnished the Texas state court a certified copy of the remand order on March 28,1989. *See* 28 U.S.C.S. sec. 1447(c) (Law. Co-op. 1989).

Rule 237a of the Texas Rules of Civil Procedure provides:

> *When any cause is removed to the Federal Court* and is afterwards remanded to the state court, *the plaintiff shall file a certified copy of the order of remand* with the clerk of the state court *and* shall forthwith *give written notice of such filing* to the attorneys of record for all adverse parties. *All such adverse parties shall have fifteen days from the receipt of such notice within which to file an answer.*

TEX. R. CIV. P. 237a (emphasis added). Rule 237a establishes a "start" date from which the 15 day answer period may be computed. The new answer date for the bankruptcy defendants in the Texas state court suit became the date 15 days after their receipt of the notice of the filing of the remand order from the plaintiffs. The defendants claim that they never received written notice of such filing from the plaintiffs. This claim is uncontradicted by the plaintiffs. The bankruptcy defendants rely on rule 237a to argue that their answers were not due at the time the default judgment was granted. They contend that the failure to comply with the provisions of rule 237a renders the default judgment void.

The plaintiffs interpret rule 237a as only requiring notice to a defendant that a case has been remanded from federal court to state court. They contend that, because the bankruptcy defendants received multiple notices of the remand, no further notification was required and there has been no violation of the rule.

The plain wording of rule 237a gives a defendant 15 days from the receipt of the plaintiff's notice of the filing of the order of remand to file an answer in

state court, without reference to whether the original removal was provident. Were we to hold that actual notice of an order of remand was sufficient to cause the 15-day period to commence, not only would we render meaningless the language of rule 237a, but we would cause confusion among practitioners concerning the "start" date from which the 15-day answer deadline is determined after a cause is remanded to state court from federal court. A discussion of rules 239 and 237a of the Texas Rules of Civil Procedure and the procedures for removing causes from state to federal court illustrates our concerns.

Rule 239 of the Texas Rules of Civil Procedure reads as follows:

> Upon such call of the docket, or *at any time after a defendant is required to answer*, the plaintiff may in term time take judgment by default against such defendant if he has not previously filed an answer, and provided that the citation with the officer's return thereon shall have been on file with the clerk for the length of time required by Rule 107.

TEX. R. CIV. P. 239 (emphasis added). In the case before us, the default was taken in "term time," and the record shows that the citations with the officers' returns were on file with the clerk for the time required by TEX. R. CIV. P. 107 and that answers were not filed before the default judgment was entered. The only element remaining to be satisfied under rule 239 is the date by which the bankruptcy defendants were required to file an answer. Rule 237a dictates the bankruptcy defendants' filing deadline.

The procedure for removal of a cause from state to federal court is set forth in 28 U.S.C.S. sec. 1446 (Law. Co-op. 1989). In part, that section reads:

> Promptly after the filing of such petition for the removal of a civil action and bond the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the petition with the clerk of such State court, *which shall effect the removal* and the *State court shall proceed no further unless and until the case is remanded.*

28 U.S.C.S. sec. 1446(d) (emphasis added). Under the federal statute, removal occurs when the proper filings are done in the federal district court and state court. If the removal procedure is defective, or if the federal district court lacks subject matter jurisdiction, the remedy is remand. *See* 28 U.S.C.S. sec. 1447(c) (Law. Co-op. 1989); *see also Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92, 97-98(1921). Until remand, however improvident a removal may have been, a cause remains removed. *See* 28 U.S.C.S. see. 1446(d). It should.be noted that an order remanding the cause may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. 28 U.S.C.S. sec. 1447(c). When causes are erroneously removed, costs may be taxed against the defendant. *See American United Life Ins. Co. v. Franklin*, 97 F.2d 76, 77 (8th Cir. 1938); *Schmidt v. NOW*, 562 F.Supp. 210, 215 (N.D. Fla. 1983).

In this case, the cause was removed to federal court and quickly remanded back to the state court. Under rule 237a, it then became the plaintiffs' obligation

to file a copy of the remand order with the clerk of the state court and to give written notice of such filing to the defendants. It should be noted that the plaintiff controls the timing of the filing and the written notice. Written notice must be accomplished in person, by registered mail, or in any other way directed by the court. TEX. R. CIV. P. 21a. Delivery in person or by registered mail generates a dated receipt from which the 15-day period can be calculated. A defendant then has 15 days after receipt of such written notice to file its answer. It is worth emphasizing that rule 5 of the Texas Rules of Civil Procedure allows the trial court in its discretion, "for cause shown," to enlarge a period during which notice may be given under the Rules. There is no comparable rule permitting a trial court to shorten any notice period under the rules.

The Texas Supreme Court has stated that the Texas Rules of Civil Procedure have the same force and effect as statutes. *Missouri Pac. R.R. v. Cross*, 501 S.W.2d 868, 872 (Tex. 1973). While the rules are to be liberally construed to ensure a fair and equitable adjudication of the rights of the litigants, their plain meaning cannot be ignored. *Heard v. Heard*, 305 S.W.2d 231, 235 (Tex. Civ. App.—Galveston 1957, writ ref'd). When a court interprets a statute, it must give effect to all the words of a statute and not treat any statutory language as surplusage if possible. *Chevron Corp. v. Redmon*, 745 S.W.2d 314, 316 (Tex. 1987); *see also City of Houston v. Morgan Guar. Int'l Bank*, 666 S.W. 2d 524, 529 (Tex. App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.), *cert. denied*, 469 U.S. 1213 (1985).

Rule 237a gives a defendant 15 days from the receipt of a plaintiff's notice of remand to file its answer. *See, e.g., Knutson v. Ripson*, 346 S.W.2d 424, 425 (Tex. Civ. App.—Amarillo 1961), *aff'd on other grounds*, 354 S.W.2d 575 (Tex. 1962). For example, a plaintiff can file a copy of

the order of remand in the state court and serve notice on the defendant on the same day the order is issued by the federal court thereby compelling the defendant to file its answer within 15 days, a comparatively short period of time.

Reading rules 237a and 239 together, we conclude that a default judgment cannot be granted against a defendant following remand of a case from federal to state court until 15 days have expired from the defendant's receipt of the remand notice from the plaintiff.

We sustain the second point of error with respect to the bankruptcy defendants.

In point of error one, the defendants contend the trial court erred in entering a default judgment after they had appeared in the case because they were not given notice of the hearing on the motion for default. In light of our disposition of point of error two, we will not address this point of error as it relates to the bankruptcy defendants, but must do so with respect to the nonbankruptcy defendants.

The nonbankruptcy defendants failed to urge this point of error before the trial court in their motion for new trial. To preserve a complaint for appellate review, a party must present to the trial court a timely request, objection, or motion. TEX. R. APP. P. 52(a); *see Davis v. Davis*, 734 S.W.2d 707, 710 (Tex. App.—Houston (1st Dist.] 1987, writ ref'd n.r.e.). Nor does the fact that the nonbankruptcy defendants allege that the lack of notice of the hearing was a violation of their due process rights under the fourteenth amendment to the United States Constitution affect their waiver of this point of error. Constitutional issues must first be raised in the trial court. *See Feinman v. State*, 717 S.W.2d 106, 115 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.).

We overrule the first point of error with respect to the nonbankruptcy defendants.

In point of error three, the defendants argue that the trial court should not have ordered the immediate release of funds from the court's registry to the plaintiffs. The defendants argue that, because the default judgment was premature and therefore void, the trial court erred in releasing the funds.

We have already decided that the default judgment was improper in relation to the bankruptcy defendants. Therefore, the trial court's order transferring the funds in its registry to the plaintiffs was also improperly granted.

We sustain the defendants' point of error three.

Therefore, we affirm the judgment with respect to the nonbankruptcy defendants, MBA East, Ltd., Ring Network, and Ring Sports Promotions; reverse the judgment with respect to the bankruptcy defendants, MBA East, Inc., Round One Productions, and Levine, and remand to the trial court; and order the plaintiffs to return the funds released to them by the trial court to its registry.

/s/ D. Camille Dunn
D. Camille Dunn, Justice

Justices Bass and O'Connor also sitting.

Publish. TEX. R. APP. P. 90.

Judgment rendered and opinion delivered
True Copy Attest:

/s/ Kathryn Cox
Clerk of Court

APPENDIX C

NO. 87-010167

JEA BOXING COMPANY, INC., AND PINE HILL INVESTMENTS, INC. d/b/a HOUSTON BOXING	§	IN THE DISTRICT COURT OF
VS.	§	HARRIS COUNTY, TEXAS
HBA EAST, LTD., A TEXAS LIMITED PARTNERSHIP, HBA EAST, INC., RING NETWORK, INC., RING SPORTS PROMOTIONS, INC., ROUND ONE PRODUCTIONS, INC., AND JEFFREY D. LEVINE	§	157TH JUDICIAL DISTRICT

JUDGMENT

BE IT REMEMBERED that on this day came on to be heard the above styled and numbered cause wherein JEA Boxing Company, Inc. and Pine Hill Investments, Inc. d/b/a Houston Boxing Association are Plaintiffs and HBA East, Ltd., HBA East, Inc., Ring Network, Inc., Ring Sports Promotions, Inc., Round One Productions, Inc., and Jeffrey D. Levine are Defendants. The Plaintiffs appeared by their attorney of record and announced ready for trial. The Defendants were duly and legally cited to appear and answer.

Citation was served according to law and returned to the Clerk where it remained on file for the time required by law.

The Defendants, although having made an appearance in this action, failed to answer this action.

After considering the pleadings on file herein, the evidence presented by the Plaintiffs at trial, and all other things material to this action, it is the opinion of this Court that the Defendant, Jeffrey D. Levine, used the corporate Defendants, HBA East, Inc., Round One Productions, Inc., Ring Network, Inc., and Ring Sports Promotions, Inc. and the limited partnership, HBA East, Ltd., as a sham to perpetrate a fraud on the Plaintiffs; that the Plaintiffs have been substantially damaged by the Defendants' fraudulent conduct; that the amount of actual damages, exclusive of interest, sustained by the Plaintiffs to which they are entitled to recover, jointly and severally from the Defendants, is $1,420,769.00; and that in addition to the actual damages sustained, the Plaintiffs are entitled to recover prejudgment interest on these damages in the amount of $794,826.00.

Further, it is the opinion of this Court that all boxing promotional rights contracts in existence or made in the name of any of the Defendants during the course of the Plaintiffs partnership relationship with the Defendants that include, but are not limited to, boxing promotional rights contracts with Carl Williams, Tony Tucker, Hector Camacho, Vincent Burgese, Roger Mayweather, and Tony Martin, as well as all sponsorship contracts in existence or made in the name of any of the Defendants during the course of the partnership relationship with the Plaintiffs that include, but are not limited to, the Cibco Importing Company (Tecate) sponsorship contract, are the property of the Limited Partnership, HBA East, Ltd.; and that dissolution of the Partnership should be ordered by this Court and all rights and interests in these Partnership contracts should be wholly assigned to the Plaintiffs.

Further, it is the opinion of this Court that the Plaintiffs are entitled to the $175,000.00, and interest, if any, on deposit in the registry of the United States District

Court for the Southern District of Texas in the case styled JEA Boxing Company. Inc. and Pine Hill Investments, Inc. d/b/a Houston Boxing Association v. HBA East. Ltd.. HBA East. Inc.. Ring Network. Inc.. Ring Sports Promotions. Inc.. Round One Productions. Inc.. and Jeffrey D. Levine, C.A. No. H-88-2214, in the United States District Court for the Southern District of Texas--Houston Division; and that the $175,000.00plus interest should be transferred to this Court's registry; and that upon transfer the Plaintiffs are entitled to withdraw immediately that amount from this Court's registry without further order of this Court.

Finally, it is the opinion of this Court that the dishonest, deceptive and fraudulent conduct of the Defendant, Jeffrey D. Levine, in his business dealings with the Plaintiffs; his use of the corporate fiction through the vehicle of the Defendants, HBA East, Inc., Round One Productions, Inc., Ring Network, Inc., and Ring Sports Promotions, Inc., as a sham to perpetrate fraud on the Plaintiffs; and the further use of his position of control as Managing Partner over the Defendant, HBA East, Ltd., entrusted in him by the Plaintiffs, as a further vehicle to defraud the Plaintiffs, all of which was to their substantial damage and warrants the imposition of substantial punitive damages against the Defendants.

It is, therefore,

ORDERED that the Plaintiffs, JEA Boxing Company, Inc. and Pine Hill Investments, Inc. d/b/a Houston Boxing Association, have and recover from the Defendants, Jeffrey D. Levine, HBA East, Inc., Ring Network, Inc., Ring Sports Promotions, Inc., Round One Productions, Inc., and HBA East, Ltd., jointly and severally, the sum of $2,215,595.00;

ORDERED that the business of the Defendant, HBA East, Ltd., be dissolved;

ORDERED that the Plaintiffs, JEA Boxing Company, Inc. and Pine Hill Investments, Inc. d/b/a Houston Boxing Association, have and recover jointly and severally from the Defendants, Jeffrey D. Levine, HBA East, Inc., Round One Productions, Inc., Ring Network, Inc., and Ring Sports Promotions, Inc., all of the rights and interests in the boxing promotional rights contracts and sponsorship contracts in existence or made during the course of the Plaintiffs' partnership relationship with the Defendants;

ORDERED that the Plaintiffs have and recover from the Defendants, Jeffrey D. Levine, HBA East, Inc., Round One Productions, Inc., Ring Network, Inc., Ring Sports Promotions, Inc., and HBA East, Ltd., jointly and severally, punitive damages in the amount of $6,645,785.00.

ORDERED that the Plaintiffs, JEA Boxing Company, Inc. and Pine Hill Investments, Inc. d/b/a Houston Boxing Associations have and recover from the Defendants, Jeffrey D. Levine, HBA East, Inc., Round One Productions, Inc., Ring Network, Inc., Ring Sports Promotions, Inc., and HBA East, Ltd., jointly and severally, interest on the total amount of this judgment at the rate of ten percent (10%) per annum from the date of judgment until paid;

ORDERED that the Defendants, Jeffrey D. Levine, HBA East, Inc., Round One Productions, Inc., Ring Network, Inc., Ring Sports Promotions, Inc., and HBA East, Ltd., pay all costs of court in this behalf expended for which let execution issue if not timely paid; and

ORDERED that the Plaintiffs are allowed such writs and processes as may be necessary in the enforcement and collection of this judgment. It is further

ORDERED that the Plaintiffs, JEA Boxing Company, Inc. and Pine Hill Investments, Inc. d/b/a Houston Boxing Association, are entitled to all monies on deposit in the registry of the United States District Court for the Southern District of Texas in the case styled JEA Boxing Company. Inc. and Pine Hill Investments. Inc. d/b/a Houston Boxing Association v. HBA East. Ltd.. HBA East. Inc.. Ring Network. Inc.. Ring Sports Promotions. Inc., Round One Productions. Inc., and Jeffrey D. Levine, C.A. No. H-88-2214, in the United States District Court for the Southern District of Texas--Houston Division; that the Clerk of that Court transfer this amount to the registry of this Court, which amount includes $175,000.00 and all interest accumulated thereon; that upon transfer and deposit in this Court's registry that the Clerk pay out the entire amount, plus any interest accumulated thereon, to the Plaintiffs without further order of this Court, and that the amount paid be credited against the total amount of this judgment.

SIGNED this the 1st of April, 1989.

/s/ Felix Salazar, Jr.
JUDGE PRESIDING

APPROVED:

VINSON & ELKINS

/s/H. Dixon Montague
H. Dixon Montague
State Bar No. 14277700
1001 Fannin Street
3200 First City Tower
Houston, Texas 77002-6760
(713) 651-2086

ATTORNEYS FOR PLAINTIFFS,
JEA BOXING COMPANY, INC. AND
PINE HILL INVESTMENTS, INC.
d/b/a HOUSTON BOXING ASSOCIATION

APPENDIX D

THE SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

February 20, 1991

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Bank Plaza
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Houston, TX 77002-5008

Ms. Linda K. McCloud
Vinson & Elkins
3200 First City Tower
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Ms. Penelope E. Nicholson
Vinson & Elkins
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Houston, TX 77002-6760

RE: Case No. D-0436

Style: HBA EAST, LTD. ET AL.
v. JEA BOXING COMPANY, INC. ET AL.

Dear Counsel:

Today, the Supreme Court of Texas overruled petitioner's motion for rehearing of the application for writ of error in the above styled case.

Sincerely,

John T. Adams, Clerk
by /s/ Courtland Crocker, Deputy

APPENDIX E

NO. 87-10167

JEA BOXING COMPANY, INC.,AND PINE HILL INVESTMENTS,INC. d/b/a HOUSTON BOXING ASSOCIATION	§	IN THE DISTRICT COURT OF
V.	§	HARRIS COUNTY, TEXAS
HBA EAST, LTD., A TEXAS LIMITED PARTNERSHIP, HBA EAST, INC., RING NETWORK INC., RING SPORTS PROMOTIONS, INC., ROUND ONE PRODUCTIONS, INC., AND JEFFREY D. LEVINE	§	157TH JUDICIAL DISTRICT

PLAINTIFFS' ORIGINAL PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW the Plaintiffs, JEA Boxing Company, Inc. ("JEA Boxing") and Pine Hill Investments, Inc. ("Pine Hill"), and bring this cause of action against the Defendants, HBA East, Ltd., a Texas Limited Partnership, HBA East, Inc., Ring Network, Inc., Ring Sports Promotions, Inc., Round One Productions, Inc., and Jeffrey D. Levine. In support of this action, the Plaintiffs would show this Honorable Court and jury the following:

I.

The Plaintiff, JEA Boxing Company, Inc., is a Texas corporation duly authorized to conduct business within Texas, and maintains its principal place of business in Houston, Harris County, Texas.

The Plaintiff, Pine Hill Investments, Inc. d/b/a Houston Boxing Association, is a Texas corporation duly authorized to conduct business within Texas, and maintains its principal place of business in Houston, Harris County, Texas.

The Defendant, HBA East, Ltd., is a Texas Limited Partnership duly authorized to conduct business within Texas, and maintains its principal place of business in Garden City, New York. HBA East, Ltd. has conducted business in Texas since its effective date of existence in January, 1985, through and at the substantial direction of its Managing Partner, HBA East, Inc. HBA East, Ltd. may be served with process by serving Manager Partner, HBA East, Inc., through its registered agent, CT Corporation System, 811 Dallas, Houston, Texas 77002.

The Defendant, HBA East, Inc., ostensibly is a New York corporation duly authorized to conduct business within Texas, and maintains its principal place of business in Garden City, New York. Since its incorporation, HBA East, Inc. has regularly conducted business in Texas, primarily in Harris County, Texas, through its president and sole shareholder, Jeffrey D. Levine. HBA East, Inc. may be served with process by serving its registered agent for service, CT Corporation System, 811 Dallas, Houston, Texas 77002.

The Defendant, Ring Network, Inc., ostensibly is a New York Corporation and does not maintain an office or regular place off business in Texas and, thus, does not

have a registered agent for service of process in Texas. However, Ring Network has entered into contracts with residents of Texas to be performed in whole or in part in Harris County, Texas, which contracts are involved in this action. Accordingly, Ring Network has appointed the Secretary of State of Texas as an agent to accept service of process in its behalf. Copies of Plaintiffs' Original Petition should be forwarded to Ring Network, Inc. in care of Jeffrey D. Levine, 585 Stewart Avenue, Garden City, New York 11530.

The Defendant, Ring Sports Promotions, Inc., ostensibly is a New York corporation and does not maintain an office or regular place of business in Texas and, thus, does not have a registered agent for service of process in Texas. However, Ring Sports Promotions has entered into contracts with residents of Texas to be performed in whole or in part in Harris County, Texas, which contracts are involved in this cause of action. Accordingly, Ring Sports Promotions, Inc., has appointed the Secretary of State of Texas as agent to accept service of process in its behalf. Copies of Plaintiffs' Original Petition should be forwarded to Ring Sports Promotions, Inc., in care of Jeffrey D. Levine, 585 Stewart Avenue, Garden City, New York 11530.

The Defendant, Round One Productions, Inc., ostensibly is a New York corporation and does not maintain an office or regular place of business in the State of Texas and, thus, does not have a registered agent for service of process in Texas. However, Round One Productions has entered into contracts with residents of Texas to be performed in whole or in part in Harris County, Texas, which contracts are involved in this action. Accordingly, Round One Productions has appointed the Secretary of State of Texas as its agent to accept service of process in its behalf. Copies of Plaintiffs' Original Petition should be forwarded to Round One Productions, Inc. in

care of Jeffrey D. Levine, 585 Stewart Avenue, Garden City, New York 11530.

The Defendant, Jeffrey D. Levine, is a resident of the State of New York. However, Levine regularly conducts business in Houston, Harris County, Texas, individually and in the name of the corporate defendants named above, which corporate defendants are merely the alter ego of Levine. Accordingly, Levine has appointed the Secretary of State of Texas as his agent to accept service of process in his behalf. Copies of the Plaintiffs' Original Petition should be forwarded to Jeffrey D. Levine at 585 Stewart Avenue, Garden City, New York 11530.

II.

In the latter part of 1984, Jeffrey D. Levine traveled to Houston, Texas, to meet with Pine Hill in an effort to convince it to enter into a partnership arrangement with him or, alternatively, a corporation over which he exercised control. The proposed partnership's purpose was to promote boxing events in New York and New Jersey and in such other places as agreed upon by the partners. At this meeting, Levine, acting in his individual capacity and as corporate representative of Ring Network, Inc., Ring Sports Promotions, Inc., and Round One Productions, Inc., made various representations, which have later proved to be false, as a material inducement to get Pine Hill to enter into this partnership arrangement. Believing all of that which it was told at this meeting by Levine to be true, Pine Hill agreed to the partnership arrangement and began spending time and money to put the partnership together. Pine Hill would not have entered in to this partnership arrangement if it had known of- the falsity of Levine's representations. These false representations have substantially damaged Pine Hill.

III.

In December, 1984, Levine formed the Defendant, HBA East, Inc., to act as a general partner in the partnership with Pine Hill. Although Levine has acted in the corporate name of HBA East, Inc. in promoting various boxing events and in other related activities, Levine has never preserved the corporate character of HBA East, Inc. HBA East, Inc. is merely the alter ego of Levine. Levine and HBA East, Inc. are used interchangeably throughout this pleading. Where one of these parties is named, the allegations are meant to extend to each.

IV.

Effective January 31, 1985, HBA East, Inc. and Pine Hill entered into a limited partnership agreement to promote boxing events in the name of HBA East, Ltd., a Texas limited partnership. A true and correct certified copy of the Limited Partnership Agreement creating HBA East, Ltd. is attached hereto and made a part hereof as Exhibit "A". This limited partnership agreement was later amended to admit the Plaintiff JEA Boxing as a second general partner and to name the Defendant, HBA East, Inc., as the Managing Partner of the Limited Partnership. A true and correct certified copy of the amended limited partnership agreement is attached hereto and made a part hereof as Exhibit "B". However, even before the creation of HBA East, Ltd., it was agreed between Pine Hill and HBA East, Inc. that their partnership relationship would be conducted substantially in accordance with the same terms and conditions later memorialized in the limited partnership agreements.

V.

As Managing Partner of HBA East, Ltd., HBA East, Inc. is restricted from engaging in any business activity in competition with the business and activities of HBA East, Ltd. or °that would in any way be detrimental to the partnership or constitute a partnership opportunity. Thus, all business transactions in which HBA East, Inc. has participated in the field of boxing promotions since January, 1985, are for the benefit and belong solely to HBA East, Ltd. Not only was this agreement contained in the limited partnership agreements attached hereto, this agreement was also the agreement among all the parties to this action even before the limited partnership was created. It has now been discovered that HBA East, Inc. has acted in breach of both its contractual agreement and its fiduciary relationship established between the parties to this action, the result of which is great and has substantially damaged the Plaintiffs.

VI.

At the requests of HBA East, Inc., Pine Hill has repeatedly sent substantial sums of money to HBA East, Inc. in order to fund the promotion of various boxing events and to generate revenues for the benefit of the limited partnership since January 1, 1985. The limited partnership agreement requires HBA East, Inc., as Managing Partner of the limited partnership, to account for all moneys received and expended by the limited partnership as well as to account for and to keep the other partners informed of all contracts, business opportunities, and other advantageous business relationships established for the partnership's benefit. Even though the Plaintiffs have made repeated requests to HBA East, Inc., through Levine, to provide such an accounting and other reporting, HBA East, Inc. has repeatedly and adamantly refused to make such an accounting. It has now been discovered that

funds that were forwarded by Pine Hill to HBA East, Inc. have been commingled in other accounts and have been used for the own self-dealing of HBA East, Inc., Levine, and other corporations and business entities over which Levine maintains control in breach of HBA East, Inc.'s contractual relationship with and fiduciary obligations owed to the Plaintiffs. Further, HBA East, Inc.'s actions and that of Levine's in this regard amount to a fraud practiced on the Plaintiffs. This conduct has caused substantial damage to the Plaintiffs.

VII.

HBA East, Inc. is contractually obligated by the limited partnership agreements to allow each of the other partners a reasonable opportunity to inspect, copy, and audit all books, records, contracts, and other documents that affect the partnership's business. The Plaintiffs have made repeated requests to HBA East, Inc. to examine these documents to determine the financial posture of the partnership's business as well as all business opportunities that may affect the business. HBA East, Inc. has repeatedly refused the Plaintiffs the opportunity to make this investigation although it has on numerous occasions recognized the Plaintiffs' right to do so. This conduct constitutes a breach of the contractual agreement HBA East, Inc. has with the Plaintiffs as well as the fiduciary obligations owed to the Plaintiffs. In an effort to achieve justice for the Plaintiffs so that they may determine the exact amounts owed them by the Defendants and, further, to discover the extent of the fraud and misrepresentations practiced on them, it is necessary that the Court appoint an auditor to make a complete audit of all of the Defendants' books, records, and other documents that may have a bearing, directly or indirectly, on the business or business opportunities of the partnership.

VIII.

HBA East, Inc. has breached its agreement with the Plaintiffs in their partnership arrangement with them by self-dealing for its own benefit through Levine. HBA East, Inc. has solely used the invested capital contributions of the Plaintiffs to fund this self-dealing. HBA East, Inc. has made boxing promotion and other contracts in its own name solely for its own benefit when those contracts should have been made in the name of HBA East, Ltd. for the benefit of all partners in the partnership. First, boxing promotion contracts with various fighters such as Tony Tucker, Carl Williams, Vincent Burgese, Roger Mayweather, Tony Martin, and Hector Camacho were made in the name of HBA East, Inc. (or in Levine's name individually or in the name of one of his corporate alter egos) with no intention of letting the Plaintiffs, as partners, receive their rightful share of and benefits from those contracts. Second, HBA East, Inc. has made contracts with various hotels in Atlantic City, New Jersey, and other cities in its own name and for its own benefit substantially relying on the funding and contacts of the Plaintiffs, as partners, to secure these contracts. Third, HBA East, Inc. has made contracts with Madison Square Garden in its own name and for its own benefit substantially relying upon the funding and contacts of the Plaintiffs, as partners, to secure these contracts. Fourth, HBA East, Inc. has made contracts with various television networks and video reproduction companies in its own name and for its own benefit substantially relying upon the funding and contacts of the Plaintiffs, as partners, to secure these contracts. Never did HBA East, Inc. inform the Plaintiffs that these contracts 'were being made in its own name; to the contrary, it repeatedly misled the Plaintiffs into believing the contracts-were made in the partnership's name and/or for its benefit. However, HBA East, Inc. now disavows the existence of any limited partnership arrangement with the Plaintiffs and refuses to allow the

Plaintiffs to receive their rightful share of the benefits of each of these contracts, business opportunities, and advantageous business relationships. This conduct amounts not only to a breach of its contractual arrangement with the Plaintiffs but also fraud. The Plaintiffs have suffered substantial damages by reason of the Defendants' conduct in this regard.

IX.

All of the contracts, potential contracts, business opportunities, and advantageous business relationships made by HBA East, Inc. (or by Levine individually or in the name of one of his corporate alter egos) with fighters, hotels, television networks, video companies, and other groups and corporations connected, directly or indirectly, to promotion or boxing events belong to and are the sole property of the partnership, whether it be found to be a general or limited partnership. HBA East, Inc., nevertheless, has received all of the revenues from these contracts and used them solely for its own personal benefit and for the benefit of Levine. Not only is this a breach of the limited partnership agreement, it is a breach of the fiduciary responsibilities HBA East, Inc. and Levine owe to the Plaintiffs. The Defendants' conduct in this regard has caused the Plaintiffs substantial damage.

X.

All contracts made and business opportunities developed by HBA East, Inc. since January 1 1985, are the property of HBA East, Ltd. These include promotional contracts with boxers, hotels, casinos, television networks, video production companies, and various other corporations and business. entities. Nevertheless, HBA East, Inc. has tortiously interfered with those contracts to the disadvantage of the partnership and, more particularly, the Plaintiffs' investment in the partnership. The Plaintiffs

by reason of this interference has suffered significant damage, and if this conduct continues, will suffer further damage.

XI.

HBA East, Inc. and HBA East, Ltd. conspired to breach their contractual and fiduciary obligations owed to the Plaintiffs as stated above for the ultimate benefit of HBA East, Inc. and Levine. This conspiratorial conduct has caused and continues to cause the Plaintiffs significant damage.

XII.

The Plaintiffs are entitled to declaratory relief in this action from the Court, declaring that cause, at law and in fact, exists for the dissolution of the partnership between the Plaintiffs and HBA East, Inc. by reason of the Defendants conduct alleged hereinabove. Further, pursuant to the Uniform Declaratory Judgments Act, the Plaintiffs are entitled to all of their attorneys' incurred in connection with this action to effect such a dissolution.

XIII.

It is necessary that a receiver be appointed to take possession of and responsibility for the assets of HBA East, Ltd. and HBA East, Inc. as well as any other corporation or business entity over which Levine exercises control that has received funds, directly or indirectly, from the Plaintiffs; to manage and operate the partnership business established between the parties to this action; to collect accounts receivable; to keep a true, complete, and accurate record of the receipts of the partnership business; to pay all approved creditors of the partnership; and to pay to Plaintiffs all sums due under the partnership agreement. If a receiver is not appointed, because of the Defendants

conduct stated hereinabove, the partnership business and the assets thereof are in danger of being' taken, removed, materially injured, or destroyed by persons who have no right to compromise the value of those assets to the Plaintiffs' detriment.

XIV.

By virtue of the wrongful actions taken by the Defendants in the past and the irreparable harm that would most likely occur in the future if these actions were allowed to proceed as before, the Plaintiffs request that this Court enjoin the Defendants from transferring any of the assets possessed by HBA East, Inc., Levine, or any one of his corporate alter egos unless transferred directly to the Plaintiffs, to a receiver appointed by the Court, or to one agreed upon among the parties to this action.

XV.

By virtue of the misappropriations of funds and fraudulent misrepresentations made by the Defendants, the Plaintiffs are entitled to recover and seek to recover in this action punitive damages to deter the Defendants from engaging in similar activities in the future and to provide an example to others who may seek to engage in the same egregious conduct as the Defendants have in this cause.

WHEREFORE, PREMISES CONSIDERED, the Plaintiffs, JEA Boxing Company, Inc. and Pine Hill Investments, Inc., pray that the Defendants, HBA East, Ltd., a Texas Limited Partnership, HBA East, Inc., Ring Network, Inc., Ring Sports Promotions, Inc., Round One Productions, Inc., and Jeffrey D. Levine, be summoned and required to answer the Plaintiffs' Original Petition; that the Plaintiffs recover their damages arising from the above enumerated contractual breaches and fraud practiced on the Plaintiffs jointly and severally from the

Defendants; that the Plaintiffs receive all of their rightful interests in various promotional contracts made in the name of any one of the Defendants; that the Defendants account to the Plaintiffs in full for the expenditures of funds in the operation of' HBA East, Ltd. and HBA East, Inc.; that the Defendants pay restitution to the Plaintiff, Pine Hill, for all monies invested in HBA East, Ltd. and funded through HBA East, Inc.; that the Plaintiffs recover all consequential damages sustained by them by reason of the Defendants' breaches of contract and fraud practiced on the Plaintiffs; that Plaintiffs recover all lost profits that they have sustained by reason of the Defendants' breaches of contract and fraud; that Plaintiffs recover punitive damages from the Defendants; that Plaintiffs recover prejudgment and post-judgment interest from the Defendants in the maximum amount provided by law; and that the Plaintiffs recover all costs of court and have such other and further relief to which they may be justly entitled.

Respectfully submitted,

VINSON & ELKINS

/s/H. Dixon Montague

H. Dixon Montague
State Bar No. 14277700
Walker W. Beavers
State Bar No. 01998900
3200 First City Tower
1001 Fannin Street
Houston, Texas 77002-6760
(713) 651-2086

ATTORNEYS FOR PLAINTIFFS, JEA BOXING COMPANY, INC. AND PINE HILL INVESTMENTS, INC. d/b/a HOUSTON BOXING ASSOCIATION

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JEA BOXING COMPANY, INC.,AND PINE HILL INVESTMENTS,INC. d/b/a HOUSTON BOXING ASSOCIATION	§	
V.	§	C. A. NO. H-88-2214
HBA EAST, LTD., A TEXAS LIMITED PARTNERSHIP, HBA EAST, INC., RING NETWORK INC., RING SPORTS PROMOTIONS, INC., ROUND ONE PRODUCTIONS, INC., AND JEFFREY D. LEVINE	§	

NOTICE OF PETITION FOR REMOVAL

TO: The Judges of the United States District Court:

Notice is hereby given that on June 27, 1988, Jeffrey D: Levine, et al., Defendants in the above entitled action, filed in the United States District Court for the Southern District of Texas, Houston Division, a Petition for Removal of the above entitled action to the United States District Court from the Harris County District Court, 157th Judicial District, Texas, pursuant to 28 U.S.C. Section 1441, together with a cash bond, conditioned as required by law. Copies of this bond and petition are attached hereto as Exhibits "A" and "B" and served herewith.

Notice is further given that on June 27, 1988, the above named Defendant filed a copy of said Petition with a copy of the bond with the Clerk of the Harris County District Court, as required by law.

DATED June 27, 1988.

Respectfully submitted,

/s/Michael A. Caddell
Michael A. Caddell
SDTA No. 7426

The Park in Houston Center
1331 Lamar, Suite 1070
Houston, Texas 77010-3027
(713) 751-0400

OF COUNSEL:

Arthur Steinberg
Kaye, Scholer, Fierman,
Hays & Handler
425 Park Avenue
New York, NY 10022
(212) 836-8000
Caddell & Conwell
1331 Lamar, Suite 1070
Houston, Texas 77010-3027

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Notice of Petition for Removal has been forwarded to all counsel of record by certified mail, return receipt requested on this the 27th day of June, 1988.

/s/Michael A. Caddell

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JEA BOXING COMPANY, INC.,AND PINE HILL INVESTMENTS,INC. d/b/a HOUSTON BOXING ASSOCIATION	§	
V.	§	C. A. NO. H-88-2214
HBA EAST, LTD., A TEXAS LIMITED PARTNERSHIP, HBA EAST, INC., RING NETWORK INC., RING SPORTS PROMOTIONS, INC., ROUND ONE PRODUCTIONS, INC., AND JEFFREY D. LEVINE	§	

CASH BOND FOR REMOVAL

KNOW ALL MEN BY THESE PRESENTS:

That Jeffrey D. Levine, HBA East, Ltd., HBA East, Inc., Ring Network Inc., Ring Sports Promotions, Inc., and Round One Productions, Inc., Petitioners, in the above-referenced cause of action, tenders the amount of $500.00 to the court as a cash bond to Plaintiffs.

The condition of this obligation is such that Petitioner have petitioned the United States District Court for the Southern District of Texas for the removal of a certain cause pending in the 157th Judicial District Court of Harris County, Texas styled:

JEA Boxing Company, Inc., and Pine Hill Investments, Inc. d/b/a Houston Boxing Association v. HBA East, Ltd., a Texas Limited Partnership, HBA East, Inc., Ring Network, Inc., Ring Sports Promotions, Inc., Round One Productions, Inc., and Jeffrey D. Levine, and bearing the number 87-10167 on the docket of such Court.

NOW, THEREFORE, the condition of the above obligation is such that if Petitioners shall pay all costs and disbursements incurred by reason of said removal proceeding, should it be determined that said action was not removable or was improper to remove, then this obligation shall be null and void; otherwise, it shall remain in full force and effect.

WITNESS MY HAND on this the 21st day of June, 1988.

/s/Michael A. Caddell
Michael A. Caddell
SDTA No. 7426

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Houston, Texas 77010-3027
(713) 751-0400

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JEA BOXING COMPANY, INC.,AND PINE HILL INVESTMENTS,INC. d/b/a HOUSTON BOXING ASSOCIATION	§	
V.	§	C. A. NO. _____
HBA EAST, LTD., A TEXAS LIMITED PARTNERSHIP, HBA EAST, INC., RING NETWORK INC., RING SPORTS PROMOTIONS, INC., ROUND ONE PRODUCTIONS, INC., AND JEFFREY D. LEVINE	§	

PETITION FOR REMOVAL

TO: The Judges of the United States District Court:

The Petition of Jeffrey D. Levine ("Levine"), HBA East, Inc., Ring Network Inc., Ring Sports Promotions, Inc., and Round One Productions, Inc., hereinafter referred to as "Petitioners," respectfully shows:

1. On March 3, 1987, the following action was commenced in the 157th Judicial District of Harris County, Texas styled: JEA Boxing Company, Inc., and Pine Hill Investments, Inc. d/b/a Houston Boxing Association vs. HBA East, Ltd., et al., and bearing the Number 87-10167. Service was made upon Petitioners of

the Plaintiffs' Original Petition therein, a copy of which is attached hereto as Exhibit "A", and incorporated for all purposes herein by reference.

2. No other proceedings have been filed in the action in Harris County.

3. On March 27, 1987, Petitioners Levine, HBA East, Inc., and Round One Productions, Inc., filed voluntary petitions for reorganization under Chapter 11 of the United States Bankruptcy Code. The filing of these petitions operated as an automatic stay of all actions and proceedings in the referenced suit in Texas State Court with respect to the Petitioners pursuant to Section 362 of the Bankruptcy Code.

4. on June 3, 1988, the Bankruptcy Court dismissed the Chapter 11 bankruptcy cases filed by Petitioners, thus lifting the automatic stay on proceedings in this case. Therefore, pursuant to 11 U.S.C. § 108, the filing of this petition for removal is timely.

5. The above-described action is a civil action of which this Court has original jurisdiction under the provisions of Title 28, U.S.C. § 1332, and is one which may be removed to this Court by Petitioners, Defendants therein, pursuant to the provisions of Title 28, U.S.C. § 1441, in that it is a civil action wherein the amount in controversy exceeds the sum or value of $10,000.00 exclusive of interest and costs, and is between citizens of different states.

6. As is shown by paragraph I of Plaintiffs' Original Petition, Petitioner Jeffrey D. Levine, at the time this action was commenced, was and still is an individual who is a citizen of the State of New York.

7. As is shown by paragraph I of Plaintiffs' Original Petition, Petitioner HBA East, Inc., at the time this action commenced, was and still is a corporation organized under the laws of the State of New York, whose principal place of business is located in the State of New York. For jurisdictional purposes, HBA East, Inc., is a citizen of the State of New York.

8. As is shown by paragraph I of Plaintiffs' Original Petition, Petitioner Ring Network, Inc., at the time this action commenced, was and still is a corporation organized under the laws of the State of New York, whose principal place of business is located in the State of New York. For jurisdictional purposes, Ring Network, Inc., is a citizen of the State of New York.

9. As is shown by paragraph I of Plaintiffs' Original Petition, Petitioner Ring Sports Promotions, Inc., at the time this action commenced, was and still is a corporation organized under the laws of the State of New York, whose principal place of business is located in the State of New York. For jurisdictional purposes, Ring Sports Promotions Inc., is a citizen of the State of New York.

10. As is shown by paragraph I of Plaintiffs' Original Petition, Petitioner Round One Productions, Inc., at the time this action commenced, was and still is a corporation organized under the laws of the State of New York, whose principal place of business is located in the State of New York. For jurisdictional purposes, Round One Productions, Inc., is a citizen of the State of New York.

11. As is shown by paragraph I of Plaintiffs' Original Petition, Plaintiff Pine Hill Investments, Inc. d/b/a Houston Boxing Association, at the time this action was commenced, was and still is a corporation organized under

the laws of the State of Texas, whose principal place of business is located in the State of Texas. For jurisdictional purposes, Pine Hill Investments, Inc. d/b/a Houston Boxing Association, is a citizen of the State of Texas.

12. As in shown by paragraph I of Plaintiffs' Original Petition, Plaintiff JEA Boxing Company, Inc., at the time this action was commenced, was and still is a corporation organized under the laws of the State of Texas, whose principal place of business is located in the State of Texas. For jurisdictional purposes, JEA Boxing Company, Inc., is a citizen of the State of Texas.

13. The proper alignment in this matter and citizenship of Named Defendant HBA East, Ltd. (if such entity exists at all), is in dispute. Although paragraph I of Plaintiffs' Original Petition identifies HBA East, Ltd., as a Texas Limited Partnership duly authorized to conduct business within Texas, and alleges that HBA East, Ltd., it maintains its principal place of business in the State of New York, the allegations set forth in Plaintiffs' Original Petition concerning the interests and citizenship of HBA East, Ltd., are false and misleading, and were made wrongfully, fraudulently, and falsely for the sole purpose of defeating diversity jurisdiction in this matter.

14. First, Petitioners dispute the existence of HBA East, Ltd. Moreover, even if the existence of HBA East, Ltd., is assumed, as shown by the Plaintiffs' Complaint (Exhibit "B" hereto) filed in the bankruptcy proceeding in New York dismissed earlier this month, Plaintiffs have seized control of HBA East, Ltd. (paragraphs 22 and 23 of the Complaint, Exhibit "B'), and all of Plaintiffs' alleged claims and causes of action herein are directed solely at Petitioners (paragraph 21 of the Complaint, Exhibit "B"). The claims directed at HBA East, Ltd., in Plaintiffs' Original Petition are a sham, since HBA East, Ltd. --if it

exists at all--is the creation of the Plaintiffs and subject to their sole control.

15. Finally, since by their own admission (paragraphs 22 and 23 of the Complaint, Exhibit "B") Plaintiffs have seized control of HBA East, Ltd. (if it exists and if Plaintiffs did not already have control), the jurisdictional allegations regarding HBA East, Ltd., which are contained in paragraph I of Plaintiffs' Original Petition cannot now be true, if they ever were. The principal place of business of HBA East, Ltd., if any, is Houston, Harris County, Texas.

16. Therefore, when the parties are properly aligned in accordance with their real interests in this controversy, and when the true facts are determined concerning the existence and citizenship of HBA East, Ltd., it will be clear that this Court has jurisdiction over this controversy pursuant to Title 28, U.S.C. § 1332.

17. Petitioners file herewith a cash bond in the sum of $500.00, conditioned, as provided by Title 28, U.S.C. § 1446(d), that Petitioners will pay all costs and disbursements incurred by reasons of the removal proceedings hereby brought, should it be determined that this action is not removable or is improperly removed.

Additionally, as verified by the attorney for Petitioners, a copy of this Petition for Removal and Notice of Filing a Cash Bond will be properly filed with the Harris County District Clerk's office.

Respectfully submitted,

/s/Michael A. Caddell
Michael A. Caddell
SDTA No. 7426

The Park in Houston Center
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Caddell & Conwell
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Houston, Texas 77010-3027
(713) 751-0400

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petition for Removal has been forwarded to all counsel of record by certified mail, return receipt requested, on this the 27th day of June, 1988.

/s/Michael A. Caddell

APPENDIX G

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

HBA BOXING COMPANY, INC., ET AL.,	§	
Plaintiffs,	§	
V.	§	C. A. NO. H-88-2214
HBA EAST, LTD., et al.,	§	
Defendants,	§	

ORDER REMANDING THE CASE TO THE 157TH DISTRICT COURT

On the plaintiffs' motion, this case is remanded to the 157th District Court, Harris County, Texas.

Signed on June 30, 1988, at Houston, Texas.

/s/Lynn N. Hughes
Lynn N. Hughes
United States District Judge

APPENDIX H

NO. 87-010167

JEA BOXING COMPANY, INC., AND PINE HILL INVESTMENTS, INC. d/b/a HOUSTON BOXING ASSOCIATION	§	IN THE DISTRICT COURT OF
VS.	§	HARRIS COUNTY, TEXAS
HBA EAST, LTD., A TEXAS LIMITED PARTNERSHIP, HBA EAST, INC., RING NETWORK, INC., RING SPORTS PROMOTIONS, INC., ROUND ONE PRODUCTIONS, INC., AND JEFFREY D. LEVINE	§	157TH JUDICIAL DISTRICT

MOTION FOR NEW TRIAL

HBA East, Ltd., a Texas limited Partnership, HBA East, Inc., Ring Network, Inc., Ring Sports Promotions, Inc., Round One Productions, Inc., and Jeffrey D. Levine, Defendants herein, move this Court to set aside the default judgment rendered on Saturday, April 1, 1989, in the above-entitled cause and order a new trial and in support hereof would respectfully show the Court the following:

I.

The default judgment granted against Defendants, HBA East, Ltd., a Texas limited partnership, HBA East, Inc., Ring Network, Inc., Ring Sports Promotions, Inc., Round One Productions, Inc. and Jeffrey D. Levine, was

defective and based on the incorrect assumption that Defendants' answer was past due, in that:

(1) Plaintiffs' attorney, Mr. H. Dixon Montague, in violation of Rule 237(a) of the Texas Rules of Civil Procedure, failed to provide the undersigned, Defendants' attorney-of-record, with written notice of the filing of the Order of Remand.[1] Rule 237(a) specifically provides that:

> When any cause is removed to Federal Court and is afterwards remanded to the state court, the plaintiff shall file a certified copy of the order of remand with the clerk of the state court and shall forthwith give written notice of such filing to the attorneys of record for all adverse parties. All such adverse parties shall have fifteen days from the receipt of such notice within which to file an answer.

1. Mr. Montague has also violated Rule 239(a) of the Texas Rules of Civil Procedure. Rule 239(a) states that "[a]t or immediately prior to the time . . . [a] final default judgment is rendered, the party taking the same or his attorney Shall certify . . . in writing the [defendants" last known mailing address . . . ." Mr. Montague filed the certificate five (5) days after entry of the default judgment. Although Defendants' counsel realizes that this violation does not effect the finality of this Court's Order, it serves to illustrate Mr. Montague's disregard for the Rules of Civil Procedure and creates serious doubt about his good faith in this matter (the delay meant that notice was not received by the Defendants until after Mr. Montague had obtained another ex narte order from this Court disbursing our $175,000 in bonds held in the Court's registry.)

The undersigned has never received written notice from Mr. Montague of the filing of the Remand Order. (Notice of the default judgment was only recently received by the Defendants in New York). (See attached affidavit.) Manifestly, Defendants' answer could not have been filed in this lawsuit until written notice was provided to Defendants' counsel.

(2) Pursuant to the express terms of Rule 239 of the Texas Rules of Civil Procedure a plaintiff may take a default judgment against a defendant only "[u]pon such call of the docket, or at any time after a defendant is required to answer . . . ." In view thereof, if the Defendants were required to file an answer and had failed to do so, entry of the judgment would have been proper. However, in light of the specific provisions of Rule 237(a), the filing of Defendants' answer was triggered only when Mr. Caddell received written notice of the filing of the Remand Order. In the absence of Rule 237(a) notice, the due-date of Defendants' answer could not have been established.

WHEREFORE, PREMISES CONSIDERED, Defendants, HBA East, Ltd., a Texas limited partnership, HBA East, Inc., Ring Network, Inc., Ring Sports Promotions, Inc., Round One Productions, Inc., and Jeffrey D. Levine, request that this Court set aside the default judgment entered in this cause and order a new trial. Defendants further pray that this Court order the return of the $175,000, plus any interest accumulated thereon, immediately into the registry of this Court; that Defendants be awarded reasonable and necessary

attorneys' fees incurred in bringing this Motion in the amount of $750.00; for costs of Court; and for such other and further relief, both at law and in equity, to which Defendants may show themselves justly entitled.

Respectfully submitted,

/s/ Michael A. Caddell
Michael A. Caddell
SBT No. 03576700

1331 Lamar, Suite 1070
Houston, Texas 77010-3027
(713) 751-0400

ATTORNEY-IN-CHARGE
FOR DEFENDANTS

OF COUNSEL:

Tamera L. Kinnie
Caddell & Conwell
1331 Lamar, Suite 1070
Houston, TX 77010-3027
(713) 751-0400

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been forwarded by hand delivery on this the 28th day of April, 1989, to the following:

H. Dixon Montague
Vinson & Elkins
1001 Fannin Street
3200 First City Tower
Houston, TX 77002-6760

/s/ Michael A. Caddell
Michael A. Caddell

H-6

NO. 87-010167

JEA BOXING COMPANY, INC., AND PINE HILL INVESTMENTS, INC. d/b/a HOUSTON BOXING ASSOCIATION	§	IN THE DISTRICT COURT OF
VS.	§	HARRIS COUNTY, TEXAS
HBA EAST, LTD., A TEXAS LIMITED PARTNERSHIP, HBA EAST, INC., RING NETWORK, INC., RING SPORTS PROMOTIONS, INC., ROUND ONE PRODUCTIONS, INC., AND JEFFREY D. LEVINE	§	157TH JUDICIAL DISTRICT

AFFIDAVIT

BEFORE ME, the undersigned authority, on this day personally appeared Michael A. Caddell who, after being duly sworn, did state the following under oath:

> My name is Michael A. Caddell. I am the attorney-of-record for Defendants herein and have personal knowledge of the following:
>
> On June 27, 1988, Defendants' Petition for Removal was filed in the United States District Court for the Southern District of Texas. Notice of the Petition for Removal was forwarded to Plaintiffs' counsel on June 27, 1988. On June 29, 1988, Plaintiffs filed their Response to Defendants' Petition for Removal and Request to Remand this cause to the 157th District Court.

The Order of Remand was signed by Judge Lynn Hughes, on June 30, 1988. Mr. Montague, Plaintiffs' counsel did not, and has not, provided me with written notice of the filing of the certified copy of the Remand Order, in violation of Rule 237(a) of the Texas Rules of Civil Procedure.

Further affiant sayeth not.

/s/ Michael A. Caddell
AFFIANT

SWORN TO AND SUBSCRIBED BEFORE ME on this the 28th day of April, 1989.

/s/ Michele Ebow
Notary Public in and for
the State of Texas

15TLK/L04802.P2

APPENDIX I

NO. 87-010167

JEA BOXING COMPANY, INC., AND PINE HILL INVESTMENTS, INC. d/b/a HOUSTON BOXING ASSOCIATION	§	IN THE DISTRICT COURT OF
VS.	§	HARRIS COUNTY, TEXAS
HBA EAST, LTD., A TEXAS LIMITED PARTNERSHIP, HBA EAST, INC., RING NETWORK, INC., RING SPORTS PROMOTIONS, INC., ROUND ONE PRODUCTIONS, INC., AND JEFFREY D. LEVINE	§	157TH JUDICIAL DISTRICT

ORDER DENYING MOTION FOR NEW TRIAL

BE IT REMEMBERED that on this day came on to be heard the Defendants' Motion for New Trial. After considering the pleadings on file herein, the evidence at trial, the arguments of counsel, and all other matters relevant to the consideration of the Defendants' Motion, it is the opinion of this Court that the Defendants' are not entitled to a new trial in this action. It is, therefore,

ORDERED that the Plaintiffs' Motion for New Trial is in all things denied.

SIGNED this the 10th day of May, 1989.

/s/ Felix Salazar, Jr.
JUDGE PRESIDING

APPROVED:

VINSON & ELKINS

/s/ H. Dixon Montague
H. Dixon Montague
State Bar No. 14277700
1001 Fannin Street
3200 First City Tower
Houston, Texas 77002-6160
(713) 651-2086

ATTORNEYS FOR PLAINTIFFS, JEA BOXING COMPANY, INC. AND PINE HILL INVESTMENTS, INC, d/b/a HOUSTON BOXING ASSOCIATION

APPROVED AS TO FORM ONLY:

CADDELL & CONWELL

/s/ Michael A. Caddell
Michael A. Caddell
State Bar No. 03576700
1331 Lamar, Suite 1070
Houston, Texas 77010-3027

ATTORNEYS FOR DEFENDANTS, HBA EAST, LTD., A TEXAS LIMITED PARTNERSHIP, HBA EAST, INC., RING NETWORK, INC., RING SPORTS PROMOTIONS, INC., ROUND ONE PRODUCTIONS, INC., AND JEFFREY D. LEVINE

APPENDIX J

NO. 01-89-557-CV

IN THE
COURT OF APPEALS
FOR THE
FIRST SUPREME JUDICIAL DISTRICT OF TEXAS
SITTING AT
HOUSTON, TEXAS

HBA EAST, LTD., ET AL.,

Appellants,

VS.

JEA BOXING COMPANY, INC., ET AL.,

Appellees.

ON APPEAL FROM THE 157TH JUDICIAL
DISTRICT COURT OF HARRIS COUNTY, TEXAS

BRIEF FOR APPELLANTS

BUTLER & BINION
Joe C. Holzer
Marilyn J. Wright
1600 First Interstate
Bank Plaza
Houston, Texas 77002
(713) 237-3642

ATTORNEYS FOR
APPELLANTS

Oral argument is requested

INTERESTED PARTIES

Pursuant to Rule 74(a), Texas Rules of Appellate Procedure, the names of all parties are listed below in order that the members of the Court may determine whether they are disqualified to serve or should recuse themselves from participation in the decision of this case.

Appellants (Defendants below) are:

HBA East, Ltd.
HBA East, Inc.
Ring Network, Inc.
Ring Sports Promotions, Inc.
Round One productions, Inc.
Jeffrey D. Levine

Appellants' counsel are:

On appeal only:

Joe C. Holzer
Marilyn J. Wright
Butler & Binion, Houston, Texas

In the trial court:

Michael A. Caddell
Caddell & Conwell, Houston, Texas

Appellees (Plaintiffs below) are:

JEA Boxing Company, Inc.
Pinehill Investments, Inc. d/b/a
Houston Boxing Association

Appellees' counsel are:

H.Dixon Montague
Vinson & Elkins, Houston, Texas

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NO. 01-89-557-CV

IN THE
COURT OF APPEALS
FOR THE
FIRST SUPREME JUDICIAL DISTRICT OF TEXAS
SITTING AT
HOUSTON, TEXAS

HBA EAST, LTD., ET AL.,

Appellants,

VS.

JEA BOXING COMPANY, INC., ET AL.,

Appellees.

BRIEF FOR APPELLANTS

TO THE HONORABLE FIRST COURT OF APPEALS:

Appellants, HBA EAST, LTD., HBA EAST, INC., RING NETWORK, INC., RING SPORTS PROMOTIONS, INC., ROUND ONE PRODUCTIONS, INC., and JEFFREY D. LEVINE ("Levine") respectfully submit this brief in support of their appeal of the default judgment entered by the trial court. This appeal is from the 157th Judicial District Court of Harris County, Texas, Cause No. 87-10167, in which Appellants were defendants and Appellees JEA BOXING COMPANY, INC., and PINEHILL INVESTMENTS, INC., d/b/a HOUSTON BOXING ASSOCIATION were plaintiffs.

For the sake of brevity and consistency, Appellants will be referred to collectively as "Appellants" and Appellees will be referred to collectively as "Appellees."

STATEMENT OF THE CASE

This is an appeal from an $8,861,380.00 default judgment, taken in violation of Texas Rule of Civil Procedure 237a, in a case which arose out of an alleged partnership between Appellants and Appellees. The trial court entered judgment on Saturday, April 1, 1989. (Tr. 129-36). On April 10, 1989, the trial court ordered the District Clerk to release funds from the registry of the court to Appellees immediately upon receipt of the funds from the United States District Court for the Southern District of Texas. (Tr. 140-41). On April 10, 1989, Appellants filed their motion for new trial, which the trial court overruled on May 10, 1989 (Tr. 142-51; 268-69). Appellants Perfected this appeal by filing their cost bond on June 2, 1989. (Tr. 447).

APPELLANTS' POINTS OF ERROR

FIRST POINT OF ERROR

THE TRIAL COURT ERRED IN ENTERING A DEFAULT JUDGMENT FOR APPELLEES BEFORE APPELLANTS' ANSWER WAS DUE UNDER TEXAS RULE OF CIVIL PROCEDURE 237a. (TR. 129-36)

SECOND POINT OF ERROR

THE TRIAL COURT ERRED IN ORDERING THE DISTRICT CLERK TO RELEASE 1FUNDS FROM THE COURT'S REGISTRY TO APPELLEES ON THE BASIS OF A VOID JUDGMENT. (TR. 140-41)

STATEMENT OF FACTS (GERMANE TO ALL POINTS OF ERROR)

Appellees filed their Original Petition on March 3, 1987, seeking the dissolution of an alleged partnership with Appellants, all right and interest in the alleged partnership's assets, and actual and punitive damages. (Tr. 2-87). HBA East,Inc. was served through its registered agent for service of process on March 5, 1987. (Tr. 89). HBA Ltd. was served through its managing partner, HBA, Inc., by service on its registered agent on March 6, 1987. (Tr. 90). The remaining defendants were served through the Secretary of State on March 6, 1987. (Tr. 91-94).

On March 27, 1987, before their answers were due in the Harris County District Court, HBA East, Inc., Round One Productions, Inc. and Levine filed petitions for Chapter 11 bankruptcy reorganization in the Eastern District of New York. (No. 187-70557-353) During the course of the bankruptcy proceedings, $175,000.00 was escrowed by order of the bankruptcy court. On June 3, 1988, the bankruptcy judge dismissed Appellants' petition.

On June 27, 1988, Appellants removed the Texas action to federal court. (Tr. 275-85). The Honorable Lynn N. Hughes, of the United states District Court for the Southern District of Texas, ordered the case remanded and ordered Appellants to deposit the $175,000.00 in escrow in New York in the registry of his Court. (Tr. 120, 160). The funds were subsequently deposited in the federal court's registry.

Judge Hughes signed an order of remand on June 30, 1988. (Tr. 128). On March 29, 1989, a certified copy of Judge Hughes' remand order was filed with the clerk of the Harris County district court. (Tr. 128). Appellants never received written notice that the remand order had been filed in Harris County. (Tr. 143).

At a hearing held on Saturday, April 1, 1989, the trial court entered a default judgment against Appellants, jointly and severally, for $2,215,595.00 in actual damages, $6,645,785.00 in punitive damages, and post-judgment interest. In addition, the judgment awarded Appellees the $175,000.00 plus interest then on deposit in the registry of the United States District Court for the Southern District of Texas, provided that the partnership upon which the underlying lawsuit was based was thereby dissolved, and awarded Appellees all right and interest in the partnership assets. (Tr. 129-39).

Appellees filed a certificate of Appellants' last known mailing address on April 5, 1989. (Tr. 137). On April 10, 1989, the trial court entered an ex parte order directing the district clerk to immediately pay all funds transferred from the registry of the Southern District to the Appellees. (Tr. 140-41).

On April 28, 1989, Appellants filed their motion for new trial, asserting that the judgment was void because their answer was not yet due according to Texas Rule of Civil Procedure 237a when judgment was rendered. (Tr. 142-51). Although Appellants had filed their original answer (Tr. 122-24), the trial court denied Appellants' motion for new trial on May 10, 1989. (Tr. 268).

ARGUMENT AND AUTHORITIES
FIRST POINT OF ERROR (RESTATED)

THE TRIAL COURT ERRED IN ENTERING A DEFAULT JUDGMENT FOR APPELLEES BEFORE APPELLANTS' ANSWER WAS DUE UNDER TEXAS RULE OF CIVIL PROCEDURE 237a. (TR. 129-36)

Pursuant to Texas Rule of Civil procedure 237a,

> When any cause is removed to the Federal Court and is afterwards remanded to the state court, the plaintiff shall file a certified copy of the order of remand with the clerk of the state court and shall forthwith give written notices of such filing to the attorneys of record for all adverse parties. All such adverse parties shall have fifteen days from the receipt of such notice within which to file an answer.

Tex. R. Civ. P 237a (Vernon Supp. 1989) Because Appellees failed to comply with Rule 237a, the default judgment in this case was premature and therefore, void.

Courts have historically looked upon default judgments with disfavor. Humphrey Co. v. Lowry Water Wells, 709 S.W.2d 310, 311 (Tex. App.--Houston [14th Dist.) 1986, no writ). Strict compliance with the rules of civil procedure is required to support a default judgment. Becker v. Russell, 765 S.W.2d 899, 900 (Tex App.--Austin 1989, no writ). In a direct attack on a default judgment, "every step of the proceeding, from process to final judgment, is open to examination" and no presumptions are entertained. Texas Inspection Serv. v. Melville, 616 S.W.2d 253, 254 (Tex App.--Houston [1st Dist.) 1981, no writ).

A party may take a default judgment against a defendant only "after a defendant is required to answer." Tex. R. Civ. P. 239 (Vernon 1976).

> The two basic judicial decisions a trial judge must make before rendering and entering a default

> judgment are (l) that the court has jurisdiction of the subject matter and the parties to the suit, and (2) that, on the record, the case is ripe for the judgment.

Finlay v. Jones, 435 S.W.2d 136, 138 (Tex 1969) (emphasis added). A judgment entered before the defendant's answer is due is void. Surety Ins. Co. v. State, 514 S.W.2d 454, 457 (Tex. Crim. App. 1974) (review of bond forfeiture proceeding governed by Rules of Civil procedure); Sublett v. Black, 617 S.W.2d 754, 756 (Tex Civ. App.--Houston [14th Dist.] 1981, writ dism'd); Ramirez v. Ramirez, 554 s.W.2d 253, 254 (Tex Civ. App.--El Paso 1977, writ dism'd w.o.j.). Appellees' default judgment was entered before Appellants' answer was due and is consequently void.

Appellees filed their Original Petition in the trial court on March 3, 1987, and served Appellants on March 6 and 7, 1987. Appellants' answers were originally due "on or before 10:00 a.m. on the Monday next after the expiration of twenty days after the date of service," or March 30, 1987. Tex. R. Civ. P. 99(b) (Vernon Supp. 1989).

On March 27, 1987, Appellants Levine, HBA East, Inc., and Round One Productions, Inc. filed bankruptcy petitions. The bankruptcy filings acted as an automatic stay and halted the pending state court action until the stay was lifted or the bankruptcy was dismissed. 11 U.S.C.A. § 362(a) (West 1979); Howard v. Howard, 670 S.W.2d 737, 739 (Tex. App.--San Antonio 1984, no writ).

On June 3, 1988, the bankruptcy was dismissed, lifting the automatic stay and allowing the state court

action to proceed.[1] On June 27, 1988, Appellants removed the Texas action to the United States District Court for the southern District of Texas. (Tr. 275-85). Although the Honorable Lynn N. Hughes signed an Order of Remand on June 30, 1988, no certified copy of that Order was filed with the Harris County district court until March 28, 1989.[2] (Tr. 128). Appellants never received written notice of this filing. (Tr. 143). Without notice to Appellants, Appellees secured a default judgment four days later.[3]

---

1. Section 108 of the Bankruptcy Code provides, in pertinent part:
(c) . . . if applicable non bankruptcy law . . . fixes a period for commencing or continuing a civil action in a court other than a bankruptcy court on a claim against the debtor, . . . and such period has not expired before the date of the filing of the petition, then such period does not expire until the later of --

(1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or

(2) 30 days after notice of the termination or expiration of the stay under section 362, 922, 1201, or 1301 of this title, as the case may be, with respect to such claim.

11 U.S.C.A. § 108(c) (West Supp. 1989). Because the automatic stay of the instant suit was terminated pursuant to section 362(c)(2)(B), the answer was due thirty days thereafter, July 5, 1988. Howard, 670 s.W.2d at 739; see Tex. R. Civ. p. 4 (Vernon 1979).

2. The clerk of the federal district court is required to furnish the state court with a certified copy of the order of remand. 28 U.S.C.A. § 1447(c) (West Supp. 1989). The trial court's docket sheet indicates receipt of the remand order on March 28, 1989, but does not reflect its source. (Tr. 445).

3. Although Rule 239a requires the party taking a default judgment to file a certificate of the defendants' last known mailing address "[a)t or immediately prior to the time" the default is entered, Appellees filed the certificate five days after entry of the judgment. (Tr. 137-39). As a result, Appellees obtained an ex parte order disbursing more than $184,000.00 from the court's registry before Appellants received notice of the judgment. (Tr. 140).

Knutson v. Ripson, 346 S.W.2d 424 (Tex. Civ. App.--Amarillo 1961, no writ) addressed the consequences of failure to provide the required written notice that a certified copy of the remand order has been filed. After quoting Rule 237a, the court stated:

> A careful search of the record reveals no such written notice was given [defendants'] attorneys. [Plaintiff) failed to comply with the plain language of the rule quoted above and therefore he is not in a position to complain of the failure of [defendants) to file their answer before the default judgment was requested.

Id. at 425.

Rule 237a is designed to protect defendants who have not filed an answer from default. Weimer v. Scott, 666 S.W.2d 384, 385 (Tex App.--Houston [14th Dist.] 1984, writ denied). Compliance would have cost Appellees the price of postage to notify Appellants that the remand order had been filed; non-compliance cost Appellants a default judgment in excess of $8.8 million. See Whitney v. L & L Realty Corp., 500 S.W.2d 94,96 (Tex 1973); Humphrey Co. v. Lowry Water Wells, 709 S.W.2d 310, 311-12 (Tex. App.--Houston [14th Dist.) 1986, no writ).

The earliest date Appellants' answer could have been due under the rules is April 12, 1989. Appellees secured their default judgment on Saturday, April 1, 1989, eleven days before Appellants' answer could possibly have been due. The trial court clearly failed to apply the second prong of the Texas Supreme Court's test: on the record, the case was not "ripe for the judgment." Finlay v.

Jones, 435 S.W.2d at 138. The judgment is void and must be set aside.

SECOND POINT OF ERROR (RESTATED)

THE TRIAL COURT ERRED IN ORDERING THE DISTRICT CLERK TO RELEASE FUNDS FROM THE COURT'S REGISTRY TO APPELLEES BASED ON A VOID DEFAULT JUDGMENT. (TR. 140-41)

On April 10, 1989, the trial court ordered the district clerk to

> immediately pay out all monies transferred to him from the Registry of the United States District Court for the southern District of Texas in the case styled JEA Boxing Co., Inc. and pinehill Investments, Inc. d/b/a Houston Boxing Association v. HBA East, Ltd., HBA East, Inc., Ring Network, Inc., Ring sports Promotions, Inc., Round One Productions, Inc., and Jeffrey D. Levine, C.A. No. H-88-2214, plus any interest accumulated thereon, to the plaintiffs.

(Tr. 140-41). As set forth in detail in the argument under Appellants' First Point of Error, the default judgment entered by the trial court on April 1, 1989, was void. A void judgment is a nullity and will not support orders in aid of its enforcement. Commander v. Bryan, 123 S.W.2d 1008, 1015 (Tex. Civ. App.--Fort Worth 1938, no writ); See also Boyd v. Gillman Film Corp., 447 S.W.2d 759 (Tex. Civ. App.--Dallas 1969, writ ref'd n.r.e.) (execution on void judgment). The trial court, therefore, erred in

ordering the immediate release to Appellees of funds from the court's registry. Those funds must be returned to the registry of the district court pending trial of this case on the merits.

CONCLUSION

The trial court rendered a multi-million dollar default judgment, including over $6,000,000.00 in punitive damages, eleven days before Appellants' answer could have been due under Rule 237a. The judgment was therefore void and of absolutely no force and effect. As a result of the entry of this void default judgment, over $184,000.00 has been released from the registry of the Harris county district court and the Appellees have taken further steps to execute against the Appellants, both in Texas and in New York. (Tr. 270-72). This judgment must be set aside and the parties returned to the status quo so that trial may proceed on the merits.

WHEREFORE, PREMISES CONSIDERED, Appellants respectfully request that this Court (1) vacate the judgment and remand this case to the trial court for further proceedings, (2) order Appellees to return the $184,482.07, plus interest, to the registry of the Harris

County district court, (3) award Appellants their costs and (4) grant such other and further relief as they may be justly entitled.

Respectfully submitted,

BUTLER & BINION

By: /s/Joe C. Holzer
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Marilyn J. Wright
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(713) 237-3642

ATTORNEYS FOR APPELLANTS, HBA EAST, LTD., a Texas Limited Partnership, HBA EAST, INC., RING NETWORK, INC., RING SPORTS PROMOTIONS, INC., ROUND ONE PRODUCTIONS, INC., and JEFFREY D. LEVINE

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief for Appellants has been forwarded by messenger to counsel for Appellees, Mr. H. Dixon Montague, 1001 Fannin, 3200 First City Tower, Houston, Texas 77002-6760 on this the 25th day of August, 1989.

/s/Marilyn J. Wright
Marilyn J. Wright

APPENDIX K

RECEIVED
FIRST COURT OF APPEALS
HOUSTON, TEXAS

OCTOBER 2, 1989

KATHRYN COX
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K-2

NO. 01-89-557-CV

IN THE
COURT OF APPEALS
FOR THE
FIRST SUPREME JUDICIAL DISTRICT OF TEXAS
SITTING AT
HOUSTON, TEXAS

HBA EAST, LTD., ET AL.,

Appellants,

VS.

JEA BOXING COMPANY, INC., ET AL.,

Appellees.

ON APPEAL FROM THE 157TH JUDICIAL
DISTRICT COURT OF HARRIS COUNTY, TEXAS

AMENDED BRIEF FOR APPELLANTS

BUTLER & BINION
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1600 First Interstate
Bank Plaza
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(713) 237-3642

ATTORNEYS FOR
APPELLANTS

Oral argument is requested

INTERESTED PARTIES

Pursuant to Rule 74(a), Texas Rules of Appellate Procedure, the names of all parties are listed below in order that the members of the Court may determine whether they are disqualified to serve or should recuse themselves from participation in the decision of this case.

Appellants (Defendants below) are:

HBA East, Ltd.
HBA East, Inc.
Ring Network, Inc.
Ring Sports Promotions, Inc.
Round One productions, Inc.
Jeffrey D. Levine

Appellants' counsel are:

On appeal only:

Joe C. Holzer
Marilyn J. Wright
Butler & Binion, Houston, Texas

In the trial court:

Michael A. Caddell
Caddell & Conwell, Houston, Texas

Appellees (Plaintiffs below) are:

JEA Boxing Company, Inc.
Pinehill Investments, Inc. d/b/a
Houston Boxing Association

Appellees' counsel are:

H.Dixon Montague
Vinson & Elkins, Houston, Texas

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APPELLANTS' POINTS OF ERROR
FIRST POINT OF ERROR

THE TRIAL ERRED IN ENTERING A DEFAULT JUDGMENT FOR APPELLEES AFTER APPELLANTS HAD APPEARED IN THE CASE, WITHOUT NOTICE TO APPELLANTS OF THE HEARING ON APPELLEES' MOTION FOR DEFAULT JUDGMENT, IN VIOLATION OF APPELLANTS' RIGHT TO DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION. (TR. 129-36)

SECOND POINT OF ERROR

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THIRD POINT OF ERROR

THE TRIAL COURT ERRED IN ORDERING THE DISTRICT CLERK TO RELEASE FUNDS FROM THE COURT'S REGISTRY TO APPELLEES ON THE BASIS OF A VOID JUDGMENT. (TR. 140-41)

STATEMENT OF FACTS (GERMANE TO ALL POINTS OF ERROR)

Appellees filed their Original Petition on March 3, 1987, seeking the dissolution of an alleged partnership with Appellants, all right and interest in the alleged partnership's assets, and actual and punitive damages. (Tr. 2-87). HBA East,Inc. was served through its registered agent for service of process on March 5, 1987. (Tr. 89). HBA Ltd. was served through its managing partner, HBA, Inc., by service on its registered agent on March 6, 1987. (Tr. 90). The remaining defendants were served through the Secretary of State on March 6, 1987. (Tr. 91-94).

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Once a defendant has made an appearance in a cause, he is entitled to notice of the trial setting as a matter of due process under the Fourteenth Amendment to the Federal Constitution. Peralta v. Heights Med. Center, Inc., ___ U.S. ___ 108 S. Ct. 896 (1988). The Judgment recites: "Defendants, although having made an appearance in this action, failed to answer." (Tr. 129). Appellants had no actual or constructive notice of the hearing on Appellees' Motion for Default Judgment. Entry of the resulting default judgment was reversible error.

On September 20, 1989, the Texas Supreme Court decided LBL Oil Co v. International Power Services, Inc., 32 Tex. Sup. Ct. J. 619 (Sept. 20, 1989). The LBL Oil Co. decision justifies the submission of this amended brief and provides definitive authority for the point of error now submitted to the Court.

In the LBL Oil Co. case the Texas Supreme Court held that default judgment proceedings are equivalent to a trial setting which cannot be conducted without actual or constructive notice of the hearing to all relevant parties who have appeared in a case. Id. at 619. Because the record in LBL Oil Co. established that the defendant had no actual or constructive notice of the hearing, the court

held that entry of the default judgment was reversible error, set aside the judgment, and remanded the cause to the trial court. Id. at 619-20. The operative facts in LBL Oil Co. are identical to the circumstances surrounding Appellants' "default" in this action. Appellants had no actual or constructive notice of the hearing conducted on Saturday, April 1, 1989, and entry of the resulting default judgment was reversible error.

The decision of the Texas Supreme Court in LBL Oil Co. is controlling. The trial court entered a multi-million dollar default judgment in violation of Appellants' Fourteenth Amendment due process rights. The judgment must therefore be set aside and this case remended to the trial court.

SECOND POINT OF ERROR (RESTATED)

THE TRIAL COURT ERRED IN ENTERING A DEFAULT JUDGMENT FOR APPELLEES BEFORE APPELLANTS' ANSWER WAS DUE UNDER TEXAS RULE OF CIVIL PROCEDURE 237a. (TR. 129-36)

Pursuant to Texas Rule of Civil Procedure 237a,

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Tex. R. Civ. P. 237a (Vernon Supp. 1989). Because Appellees failed to comply with Rule 237a, the default judgment in this case was premature and therefore, void.

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On March 27, 1987, Appellants Levine, HBA East, Inc., and Round One Productions, Inc. filed bankruptcy petitions. The bankruptcy filings acted as an automatic stay and halted the pending state court action until the stay was lifted or the bankruptcy was dismissed. 11 U.S.C.A. § 362(a) (West 1979); Howard v. Howard, 670 S.W.2d 737, 739 (Tex. App.--San Antonio 1984, no writ).

On June 3, 1988, the bankruptcy was dismissed, lifting the automatic stay and allowing the state court

action to proceed.[1] On June 27, 1988, Appellants removed the Texas action to the United States District Court for the Southern District of Texas. (Tr. 275-85). Although the Honorable Lynn N. Hughes signed an Order of Remand on June 30, 1988, no certified copy of that Order was filed with the Harris County district court until March 28, 1989.[2] (Tr. 128). Appellants never received written notice of this filing. (Tr. 143). Without notice to Appellants, Appellees secured a default judgment four days later.[3]

1. Section 108 of the Bankruptcy Code provides, in pertinent part:
(c) . . . if applicable non bankruptcy law . . . fixes a period for commencing or continuing a civil action in a court other than a bankruptcy court on a claim against the debtor, . . . and such period has not expired before the date of the filing of the petition, then such period does not expire until the later of --

(1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or

(2) 30 days after notice of the termination or expiration of the stay under section 362, 922, 1201, or 1301 of this title, as the case may be, with respect to such claim.

11 U.S.C.A. § 108(c) (West Supp. 1989). Because the automatic stay of the instant suit was terminated pursuant to section 362(c)(2)(B), the answer was due thirty days thereafter, July 5, 1988. Howard, 670 s.W.2d at 739; see Tex. R. Civ. p. 4 (Vernon 1979).

2. The clerk of the federal district court is required to furnish the state court with a certified copy of the order of remand. 28 U.S.C.A. § 1447(c) (West Supp. 1989). The trial court's docket sheet indicates receipt of the remand order on March 28, 1989, but does not reflect its source. (Tr. 445).

3 Although Rule 239a requires the party taking a default judgment to file a certificate of the defendants' last known mailing address "[a]t or immediately prior to the time" the default is entered, Appellees filed the certificate five days after entry of the judgment. (Tr. 137-39). As a result, Appellees obtained an ex parte order disbursing more than $184,000.00 from the court's registry before Appellants received notice of the judgment. (Tr. 140).

Knutson v. Ripson, 346 S.W.2d 424 (Tex. Civ. App.--Amarillo 1961, no writ) addressed the consequences of failure to provide the required written notice that a certified copy of the remand order has been filed. After quoting Rule 237a, the court stated:

> A careful search of the record reveals no such written notice was given [defendants'] attorneys. [Plaintiff) failed to comply with the plain language of the rule quoted above and therefore he is not in a position to complain of the failure of [defendants] to file their answer before the default judgment was requested.

Id. at 425.

Rule 237a is designed to protect defendants who have not filed an answer from default. Weimer v. Scott, 666 S.W.2d 384, 385 (Tex. App.--Houston [14th Dist.) 1984, writ denied). Compliance would have cost Appellees the price of postage to notify Appellants that the remand order had been filed; non-compliance cost Appellants a default judgment in excess of $8.8 million. See Whitney v. L & L Realty Corp., 500 S.W.2d 94, 96 (Tex. 1973); Humphrey Co. v. Lowry Water Wells, 709 S.W.2d 310, 311-12 (Tex. App.--Houston [14th Dist.] 1986, no writ).

The earliest date Appellants' answer could have been due under the rules is April 12, 1989. Appellees secured their default judgment on Saturday, April 1, 1989, eleven days before Appellants' answer could possibly have been due. The trial court clearly failed to apply the second prong of the Texas Supreme Court's test: on the

record, the case was not "ripe for the judgment." Finlay v. Jones, 435 S.W.2d at 138. The judgment is void and must be set aside.

THIRD POINT OF ERROR (RESTATED)

THE TRIAL COURT ERRED IN ORDERING THE DISTRICT CLERK TO RELEASE FUNDS FROM THE COURT'S REGISTRY TO APPELLEES BASED ON A VOID DEFAULT JUDGMENT. (TR. 140-41)

On April 10, 1989, the trial court ordered the district clerk to

> immediately pay out all monies transferred to him from the Registry of the United States District Court for the Southern District of Texas in the case styled JEA Boxing Co., Inc. and Pinehill Investments, Inc. d/b/a Houston Boxing Association v. HBA East, Ltd., HBA East, Inc., Ring Network, Inc., Ring Sports Promotions, Inc., Round One Productions, Inc., and Jeffrey D. Levine, C.A. No. H-88-2214, plus any interest accumulated thereon, to the plaintiffs.

(Tr. 140-41). As set forth in detail in the argument under Appellants' First Point of Error, the default judgment entered by the trial court on April 1, 1989, was void. A void judgment is a nullity and will not support orders in aid of its enforcement. Commander v. Bryan, 123 S.W.2d 1008, 1015 (Tex. Civ. App.--Fort Worth 1938, no writ); See also Boyd v. Gillman Film Corp., 447 S.W.2d 759 (Tex. Civ. App.--Dallas 1969, writ ref'd n.r.e.) (execution on

void judgment) The trial court, therefore, erred in ordering the immediate release to Appellees of funds from the court's registry. Those funds must be returned to the registry of the district court pending trial of this case on the merits.

CONCLUSION

The trial court rendered a multi-million dollar default judgment, including over $6,000,000.00 in punitive damages, eleven days before Appellants' answer could have been due under Rule 237a. The judgment was therefore void and of absolutely no force and effect. As a result of the entry of this void default judgment, over $184,000.00 has been released from the registry of the Harris County district court and the Appellees have taken further steps to execute against the Appellants, both in Texas and in New York. (Tr. 270-72). This judgment must be set aside and the parties returned to the status quo so that trial may proceed on the merits.

WHEREFORE, PREMISES CONSIDERED, Appellants respectfully request that this Court (1) vacate the judgment and remand this case to the trial court for further proceedings, (2) order Appellees to return the $184,482.07, plus interest, to the registry of the Harris

County district court, (3) award Appellants their costs and (4) grant such other and further relief as they may be justly entitled.

Respectfully submitted,

BUTLER & BINION

By: /s/Joe C. Holzer
Joe C. Holzer
State Bar No. 09933800
Marilyn J. Wright
State Bar No. 22048680
1600 First Interstate Bank Plaza
Houston, Texas 7 7002
(713) 237-3642

ATTORNEYS FOR APPELLANTS, HBA EAST, LTD., a Texas Limited Partnership, HBA EAST, INC., RING NETWORK, INC., RING SPORTS PROMOTIONS, INC., ROUND ONE PRODUCTIONS, INC., and JEFFREY D. LEVINE

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Amended Brief for Appellants has been forwarded by messenger to counsel for Appellees, Mr. H. Dixon Montague, 1001 Fannin, 3200 First City Tower, Houston, Texas 77002-6760 on this the ___ day of _____, 1989.

/s/ Marilyn J. Wright
Marilyn J. Wright

APPENDIX L

DATE: /s/5/12/89

REQUEST FOR WRIT OF EXECUTION,
WRIT OF EXECUTION & ORDER OF SALE
OR WRIT OF POSSESSION

Please process this request to have:

__X__ WRIT OF EXECUTION ISSUED
____ WRIT OF EXECUTION & ORDER OF SALE ISSUED
____ WRIT OF POSSESSION ISSUED

Returnable in: ___ 30 days ___ 60 days ___ 90 days

Party requesting: Plaintiff

Cause No.: 87-10167 Court: 157th Judicial District Court

Style JEA Boxing Company, Inc., and Pine Hill Investments, Inc. d/b/a Houston Boxing Association

vs. HBA East Ltd., a Texas Limited Partnership, HBA East, Inc., Ring Network, Inc., Ring Sports , Promotions Inc., Round One Productions, Inc.,and Jeffrey D. Levine

Date of Judgment: April 1, 1959

Amount of Judgment: $2,215,595.00 actual damages; $6,645,785.00 punitive damages

County or Counties to be executed: Nassau County, New York

Judgment Credits, if any: $175,000.00

Please mail this execution to: Vinson & Elkins
Law Firm
H. Dixon Montague
Attorney
1001 Fannin, 3300 First City Tower
Houston, TX 77002-6760
Address

This request is made in accordance with the time frames set out in Rule 627 T.R.O.C.

Requested by: H. Dixon Montague

RECORDER'S MEMORANDUM

This page is not satisfactory for photographic recordation due to carbon or photo copy, discolored paper, etc. All block-outs, additions and changes were present at time instrument was filed and recorded.

PJ-16 RO8-02-88

APPENDIX M

NO. 87-010167

JEA BOXING COMPANY, INC., AND PINE HILL INVESTMENTS, INC. d/b/a HOUSTON BOXING ASSOCIATION	§	IN THE DISTRICT COURT OF
VS.	§	HARRIS COUNTY, TEXAS
HBA EAST, LTD., A TEXAS LIMITED PARTNERSHIP, HBA EAST, INC., RING NETWORK, INC., RING SPORTS PROMOTIONS, INC., ROUND ONE PRODUCTIONS, INC., AND JEFFREY D. LEVINE	§	157TH JUDICIAL DISTRICT

AFFIDAVIT FOR IMMEDIATE EXECUTION

BEFORE ME, the undersigned Notary Public, on this day personally appeared H. Dixon Montague, attorney for JEA Boxing Company, Inc. and Pine Hill Investments, Inc., who being by me duly sworn on his oath stated that he is the Plaintiff's attorney in charge in the cause styled JEA Boxing Company. Inc. and Pine Hill Investments. d/b/a Houston Boxing Association v. HBA East. Ltd.. A Texas Limited Partnership. HBA East. Inc.. Ring Network. Inc.. Ring Sports Promotions. Inc.. Round One Productions. Inc.. and Jeffrey D. Levine, No. 87-010167, in the 157th Judicial District Court, Harris County, Texas; that judgment was rendered in favor of the Plaintiffs on the 1st day of April, 1989, in the amount of $2,215,595.00 actual damages and $6,645,785.00 punitive

damages with interest on the total amount of judgment at the rate of ten percent (10%) per annum from the date of judgment until paid, against the Defendants, Jeffrey D. Levine, HBA East, Inc., Round One Productions, Inc., Ring Network, Inc., Ring Sports Promotions, Inc., and HBA East, Ltd., jointly and severally; and that Jeffrey D. Levine for the purpose of further defrauding the Plaintiffs has transferred and it is believed will continue to transfer his personal property and assets and those of the other Defendants, over which he exercises sole control, out of his own name and the name of the other Defendants to make himself and the other Defendants "judgment proof". These assets and property referred to above are subject to execution.

/s/ H. Dixon Montague
H. Dixon Montague

SUBSCRIBED AND SWORN TO BEFORE ME on this the 12th day of May, 1989, to certify which witness my hand and official seal.

/s/ Marianne Garcia
Notary Public, in and for
Harris County, Texas

APPENDIX N

KAYE, SCHOLER, FIERMAN, HAYS & HANDLER
425 PARK AVENUE
NEW YORK, N.Y. 10022

(212) 836-8000

Writer's Direct Dial Number
(212) 836-8564

June 14, 1988

Office of the Court Clerk
District Court, Harris County, Texas
157th Judicial District
Post Office Box 4651
Houston, Texas 77210

Re: JEA Boxing Company, Inc., and Pine Hill Investments, Inc. d/b/a Houston Boxing Association v. HBA East, Ltd., A Texas Limited Partnership, HBA East, Inc., et al; Index No. 87-10167 (the "Texas Action")

To The Clerk of the Court:

We represent HBA East, Inc., Round One Productions, Inc. and Jeffrey W. Levine (collectively, the "Debtors"), which are parties named as defendants in the Texas Action.

On or about March 3, 1987, the plaintiffs commenced the Texas Action against the Debtors, among others. Thereafter, on March 27, 1987 and prior to the time within which the Debtors were required to serve their answer or to file a motion for the removal of the Texas Action to the federal district court, the Debtors filed

voluntary petitions for reorganization under Chapter 11 of the United States Bankruptcy Code. The filing of the foregoing petitions operated as an automatic stay of all actions and proceedings with respect to the Debtors, including the Texas Action, pursuant to Section 362 of the Bankruptcy Code.

Thereafter, on April 24, 1987, the plaintiffs in the Texas Action commenced Adversary Proceeding No. 187-0086 in the United States Bankruptcy Court for the Eastern District of New York (the "Bankruptcy Court") in which the Debtors' Chapter 11 cases were pending (the "New York Proceeding"). A copy of the plaintiffs' complaint in the New York Proceeding, together with exhibits, has been enclosed for your review. As may be readily seen, the plaintiffs' complaint in the New York proceeding, alleges state law claims identical to those which have been raised in the Texas Action. Essentially, by commencing the New York Proceeding, the plaintiffs shifted the venue for the adjudication of such claims from Texas to the New York federal courts.

On May 20, 1987, the Debtors timely filed and served their answer (the "Answer") in the New York Proceeding and, in addition, alleged seven counterclaims against the plaintiffs. The plaintiffs, in turn, filed a reply to the Debtors' counterclaims. During the pending of the Debtors' Chapter 11 cases, discovery conferences were conducted by the Bankruptcy Court, and the respective parties have responded to demands for document production and have conducted depositions in connection with the New York Proceeding. A copy of the Answer as well as the plaintiff's reply are also enclosed herewith.

By an order, dated June 3, 1988 (the "Order"), the Bankruptcy Court dismissed the Debtors' Chapter 11

reorganization cases. However, the Order failed to address the current status of the New York Proceeding in view of the dismissal. Accordingly, the Debtors' intend promptly to move for a clarification of the Order in this respect.

It is the Debtors' position that, in view of the pleadings filed and the progress made in discovery during the pendency of the Debtors' Chapter 11 cases, the New York Proceeding should be transferred from the Bankruptcy Court to the New York federal district court. Alternatively, the Debtors will seek an extension of the time within which to file a petition for removal of the Texas Action to the appropriate federal district court.

We write in order to apprise the Court of the Debtors' current situation. In the event that the Bankruptcy Court determines not to transfer the New York Proceeding to the federal district court in New York, then the instant letter should be deemed a request for the removal of the Texas Action to the federal district court and that all pleadings filed in the New York Proceeding, including the Answer, be deemed the duly filed pleadings of the parties in the Texas Action.

Significant judicial economics can be achieved by continuing the New York Proceeding in the Federal District Court of New York. We hope that the plaintiffs and the Court will recognize that fact so that there may be a prompt adjudication of the underlying claims asserted by the parties hereto. Should a different approach be deemed more advisable by the Court in order to achieve any of the foregoing actions, please apprise us of that fact.

We thank you in advance for your attention and consideration in connection with this matter.

Respectfully yours,

/s/ Arthur Steinberg (JPSD)
Arthur Steinberg

Enclosures

cc: Brian M. Cogan, Esq.
H. Dixon Montague, Esq.

APPENDIX O

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JEA BOXING COMPANY,	*	C.A. No. H-88-2214
INC., AND PINE HILL	*	
INVESTMENTS, INC. d/b/a	*	Houston, Texas
HOUSTON BOXING	*	July 8, 1988
ASSOCIATION	*	8:30 a.m.
	*	
VERSUS		*
	*	
HBA EAST, LTD., A TEXAS	*	
LIMITED PARTNERSHIP,	*	
et al	*	

TRANSCRIPT OF HEARING
BEFORE THE HONORABLE LYNN N. HUGHES
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff: Mr. H. Dixon Montague
Vinson & Elkins
3200 First City Tower
Houston, Texas 77002

For Kaye-Scholer: Mr. Rey Stroube
Akin, Gump, Strauss, Haver & Feld
700 Louisiana
Houston, Texas 77002

For Jeffrey Levine: Mr. Michael A. Caddell
Ms. Leslie McDonnell
Caddell & Conwell
1331 Lamar, Suite 1070
Houston, Texas 77010

Court Reporter: Fred Warner
515 Rusk Avenue
Houston, Texas 77002

Proceedings recorded by mechanical stenography, produced by computer-aided transcription.

[2]

THE COURT: I have a couple of elementary questions, Mr. Caddell.

I talked to one of Steinberg's partners yesterday whose name I neglected to get. He told me that the firm had ceased representing the parties' defendant in this case.

Do you know anything about that.

MR. CADDELL: Judge, I was advised of that on Tuesday and was told their firm felt that because of the interpleader and because they were taking actions to protect their fees that they deemed might be adverse to the best interest of their client, they felt it would be necessary to withdraw from their representation.

I understand that the Kaye-Scholer firm is represented here today by Mr. Stroube from Akin-Gump.

THE COURT: Mr. Stroube, perhaps you can --

MR. STROUBE: Good morning, Your Honor. I am Rey Stroube with Akin, Gump, Strauss, Haver and Feld here in Houston.

I got hired while I was in a hearing yesterday in Waco and maybe I am not totally up to snuff on this, but I believe the [sic] you talked to Mr. Becaso. I spoke to him yesterday afternoon late, I think, subsequent to your conversation.

My understanding is that the firm is representing, the Kaye-Scholer firm is representing this debtor, HBA East in the bankruptcy court in Eastern District of New York. They have

never made an appearance in this case on behalf of any party and that they have not served as an agent in this case to any extent.

THE COURT: Mr. Steinberg made an appearance here on the 29th.

MR. STROUBE: But not in representation of any of these defendants, Your Honor.

THE COURT: He participated in the motion hearing by telephone.

MR. MONTAGUE: Also, pleadings have been filed with this Court.

THE COURT: At no time did he disassociate himself.

MR. STROUBE: I understand there is one pleading where Kaye-Scholer is shown of counsel on that pleading, drafted by Mr. Caddell, and Mr. Caddell will tell the Court that was in error.

THE COURT: Why didn't Mr. Steinberg tell me it was in error when he participated about an hour last Wednesday?

MR. STROUBE: I don't know the answer to that, Your Honor. I haven't had an opportunity to talk to Mr. Steinberg.

Mr. Caddell could explain that.

MR. CADDELL: If I might respond to that. With respect to naming Mr. Steinberg of counsel, that was done

without his consultation. That was done simply as a matter of course in our office. Whenever we are contacted by someone from out of state

[4]

and asked to act as local counsel or file pleadings, we list them of counsel. My secretary did that.

I didn't confer with Mr. Steinberg particularly on the question of whether he should be listed as of counsel or not.

When he saw the pleading and he had been listed, he called me and asked that that be taken off the pleading. That was not his intent, and at that point this was -- as I say, on Tuesday they were withdrawn from any representation of the defendants as to Mr. Steinberg.

THE COURT: Which Tuesday are you talking about?

MR. CADDELL: Talking about three days ago, Judge, July 5th.

THE COURT: I am talking about Wednesday, June the 29th.

MR. CADDELL: I was fixing to respond to that.

With respect to his participation in a telephone call, Judge, when I get a call from a Federal Judge who wants to talk to me about anything, I talk to them. I don't tell him it's not any of my affair or I am not involved or anything like that.

I don't know that Mr. Steinberg stated that he did represent the defendants in that phone conversation. Of

course, I was not privy to it, but it did appear to me that he advised the Court of his firms possessory lien on that fund, which is in

[5]

itself an indication that their interest may not be aligned with those of the defendants.

THE COURT: First, that's not true because that meant every lawyer who ever acquired any property of a client over which they could assert a possessory interest would be in a conflict with their client, and so you would never have the ability to assert a possessory lien because as soon as you got something, you would have to quit representing them, and that is an irrational position.

Secondly, I don't know how long the hearing went on, but you were allowed twice to go off for extended periods and confer privately with Mr. Steinberg, and at no time did he suggest that -- he did say he had a possessory lien, but that rose by operation of law. It didn't take any assertion by Mr. Steinberg. He either has it or doesn't.

MR. CADDELL: Judge, I think it may be that the Court's order highlighted for Mr. Steinberg the problem that they have with that money because if the funds are transferred -- and we talked a little bit about this last Wednesday. I may not have articulated it very well, but funds transferred from New York to Texas, there is a grant of substantive relief or potential substantive relief to the defendants they are not otherwise entitled to.

There has been no evidentiary hearing on which to base that grant, and I am concerned there is no jurisdiction.

* * *

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* * *

the Court in those transcripts.

Also Mr. Levine admits that he owes Mrs. Abercrombie's companies, the plaintiffs in this case, in excess of amount held in escrow.

MR. CADDELL: Mr. Montague --

THE COURT: Wait. Wait. Wait.

MR. MONTAGUE: Nevertheless, Your Honor, they are still fighting over $175,000 of the entitlement thereto.

Mr. Levine even admitted on the stand on the bankruptcy court that he owes Mrs. Abercrombie far in excess of that amount.

Your Honor, I don't understand how these defendants have been allowed to go so long and abuse the Court system so badly in the number of ways that they have. There has got to be a stop to it.

We are here before this Court where a stop can be put, and that's why we filed our motion for contempt. There was open defiance of the Court's order.

Mr. Steinberg made an appearance before this Court, Your Honor, and it is absolutely absurd for Mr. Caddell to come in here and try to represent to this Court Mr. Steinberg made no appearance. He was on the pleadings. He talked to you on the telephone about the case in [sic] his representation to [sic] the defendants. I was sitting in the room when you talked to him.

I know that you made the assertion, Mr. Steinberg,

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well, you represent these defendants. I don't know what Mr. Steinberg said in response, but I think Your Honor would know if Mr. Steinberg said, no, I don't represent these defendants.

Your Honor, it's very peculiar that Mr. Steinberg is now instructing Mr. Caddell, on July the 5th, almost a week after we had the hearing on the petition for removal before this Court that, wait a minute, maybe I shouldn't be named as counsel in this case because it may be construed as an appearance in this case as representing the defendants in this case and maybe that order issued on June 29th does bind me and my law firm.

THE COURT: Even if he had withdrawn from representing these defendants at noon on the 29th and had just forgotten to mention that that afternoon, he still holds the funds as a de facto agent. Whether he is an attorney of record or any of those kinds of things, he held the funds in an escrow deposit on the 29th as an agent or some related party to the defendants.

Mr. Caddell.

MR. CADDELL: I am concerned that what we're doing here is getting caught up in what may or may not be the equities of the situation, and I have argued the equities and am prepared to do so, but I'm concerned that we're ignoring the law and the concepts of jurisdiction and authority, and while Mr. Montague has been, apparently, well-versed on New York lien law, and if it is as he says, then there should be a Rule 11 motion filed in Federal District Court in The Southern District of New York with

* * *

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* * *

transcript -- my clients were prepared to go forward and it was the plaintiffs --

THE COURT: They're under no duty, Mr. Caddell, to go forward with an adversary action in a bad faith bankruptcy. they had every right, in fact, a duty to get the entire bankruptcy dismissed. They do not have to play in your minacious forum.

MR. CADDELL: I agree with that, Judge, but the point --

THE COURT: Then when they get remanded, after spending huge sums of money getting that bankruptcy dismissed, they set a hearing, you set a hearing in state court.

MR. CADDELL: No, Your Honor.

THE COURT: Who set the hearing? They set the hearing?

MR. CADDELL: I never received notice a hearing was set. I don't know that one was set. That's just Mr. Montague's representation. I have never seen a piece of paper or seen any indication. In fact, I have spoken with Judge Salazar. He didn't know a hearing had been set.

MR. MONTAGUE: That's an affirmative misrepresentation to this Court.

THE COURT: Even if that's true, something motivated Kaye-Scholer to get you to remove the action.

MR. CADDELL: It had nothing to do with any hearing or notice of hearing or anything else.

* * *

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* * *

understand it.

MR. MONTAGUE: On the reasonable and necessary attorneys' fees, Your Honor, the reasonable and necessary attorney's fees up to this date were 15,680, which Mr. Caddell agreed to before we left the hearing this morning, and I understand from Ms. McDonnell that that's correct.

We have incurred an additional 1,475 due to having to appear today in the courtroom, and I would ask for those, too, in addition to the 15,680.

THE COURT: Now, what's the 15,000?

MR. MONTAGUE: That's the reasonable and necessary attorneys' fees that are sanctions, Your Honor, pursuant to Rule 11, which I requested in my motion filed with the Court on July 1st, as I recall, contempt motion.

Mr. Caddell has agreed to the $15,680 amount.

MS. McDONNELL: Your Honor, if I may respond.

We have agreed not to argue with what were reasonable and necessary fees as far as V & E's fees in this case; however, we do feel that as far as sanctions being imposed in this case for failure on Mr. Levine's part and the defendant's part as to bring the money to the registry

of the Court that the sanctions as far as Rule 11 should not be applied in the sense that Mr. Levine seriously did not have control over those funds.

He was not able without Kaye-Scholer's consent,

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due to a possessory lien, to remove those funds from the account. In fact, the account was in the name of Kaye-Scholer.

THE COURT: I am sorry. You missed the fun part this morning.

MS. McDONNELL: I realize that.

It's just as far as, merely as far as sanctions are concerned, we literally did not have the power to do so.

THE COURT: Kaye-Scholer, he is responsible for depositing -- I mean, if he had given it to Manfactures Hanover and they wouldn't give it back to him, that's his problem. That's not the court or the other side's problem, but the 15,000, is that for the removal and everything?

MR. MONTAGUE: Yes, sir. That's for the removal and up to this point in time in this action.

THE COURT: I am inclined to give you the $150 for the cost of this proceeding, but I think the 15,000 ought to go with the underlying case.

MR. MONTAGUE: Well, Your Honor, in order to come before this Court, there were attorneys' fees, significant attorneys' fees incurred, which we have asked for, pursuant to Rule 11 when we were over here in the first instance, as you will recall. We are again reurging --

THE COURT: I don't recall that, but I will take your word for it.

MR. MONTAGUE: Well, the pleading is on file with the

* * *

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* * *

We went over that again this morning, but I think I'm being fairly modest with the attorneys' fees.

MR. MONTAGUE: One more bit of clarification, Your Honor. There are three clusters here of people.

Is it the Court's order, the Court's ruling that each of the three clusters pay $1,250?

THE COURT: It's $2500. I take her clients to be the clients in the real action, the underlying action. Mr. Stroube is representing the intervening offer. I am assessing it half between them.

What's the third cluster?

MR. MONTAGUE: The third cluster is the law firm of Caddell and whatever it is.

MS. McDONNELL: Caddell & Conwell.

MR. MONTAGUE: Caddell & Conwell.

THE COURT: Why would I assess them?

MR. MONTAGUE: Because, Your Honor, they appeared here signing pleadings under Rule 11 opposing

the contempt motion, fighting what we're here, the very basis of what you are ordering attorneys' fees to be paid in this action, making all these sworn affidavits contesting what we've been doing. That's what Rule 11 is all about, as I understand it. Rule 11 really goes to the lawyers as opposed to the parties.

THE COURT: I understand, and I don't like it.

Mr. Caddell and Mr. Stroube appeared here and

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vigorously represented their clients. They lost the argument. Their clients are going to have to pay part of your attorneys' fees.

Other than not stopping when I asked them to, nobody, I think, stepped out of bounds, and Mr. Caddell was more tenacious than I would have been under the circumstances, but I am not sure that's his fault but the lawyers of whom the Court has developed a fairly skeptical view are Mr. Stroube's clients, but I am not going to punish Akin-Gump for representing a bunch of New York lawyers who apparently don't take orders seriously. They should be punished and not Mr. Stroube or his firm

MR. MONTAGUE: No, sir. I am not asking Mr. Stroube or his firm to be punished.

THE COURT: Mr. Caddell was, essentially, as I appreciate following the referring counsel's instructions, and he represented the position, as defective as it was, as best he could without being -- I think he was not obsteporous or particularly intransigent.

MR. MONTAGUE: Just doing what Mr. Steinberg told him to do.

THE COURT: That's a problem that --

MR. MONTAGUE: You pulled the trigger on the gun, Mr. Conwell. I will show you who to point it at

THE COURT: There is some truth to that, but as a lawyer who frequently has gotten things referred to them,

* * *

[Certification]

* * *

CERTIFICATION

I, FRED WARNER, Official Court Reporter for the United States District Court for the Southern District of Texas, Houston Division, do hereby certify that the foregoing pages 1 through 58 are a true and complete transcript of the proceedings had in the aboved-styled and numbered cause before the Honorable LYNN N. HUGHES, United States District Judge, on the 8th day of July, 1988.

WITNESS MY OFFICIAL HAND at my office in Houston, Harris County, Texas on this the 11th day of July, A.D., 1988.

/s/ Fred Warner

Fred Warner, CSR

Official Court Reporter

APPENDIX P

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JEA BOXING COMPANY, INC., et al	§	
	§	
Plaintiffs,	§	
	§	
VS.	§	C.A. NO. H-88-2214
	§	
HBA EAST, LTD., et al.	§	
	§	
Defendants.	§	

RESPONSE TO ORDER TO SHOW CAUSE

COMES NOW, HBA East, Inc., Ring Network, Inc., Ring Sports Promotions, Inc., Round One Production, Inc. and Jeffrey D. Levine, Defendants in the above-entitled and numbered cause of action and makes this their Response to the Court's Order to Show Cause why they should not be held in contempt of court for failure to comply with this Court's June 29, 1908, Order and would show as follows:

I.

The Escrow Account

1.1 On June 29, 1988, this Court signed an order that $175,000.00 of escrowed funds (the "Escrowed Funds") in Adversary Proceeding No. 187-0086, JEA Boxing Company. Inc.. et al v. HBA East. Inc.. et al, In the United States Bankruptcy Court of the Eastern District of New York (the "Bankruptcy Proceedings"), be deposited immediately into this Court's Registry.

1.2 The Escrowed Funds referenced in the June 29th Order were held on that date in a joint escrow account in the name of Kaye, Scholer, Fierman, Hays & Handler ("Kaye, Scholer"), as counsel for the Debtors and Stroock, Stroock & Lavan as counsel for the Movants in the above-referenced bankruptcy proceeding.

1.3 The bankruptcy proceeding was dismissed by Judge Feller on June 3, 1988. At the time of the dismissal, Kaye, Scholer not only had possession of the Escrowed Funds but also had, under New York law, a possessory lien over the funds for their unpaid legal fees.

1.4 At all times pertinent to this litigation, Kaye, Scholer has had a possessory lien over substantially all of the Escrowed Funds.

II.

The Possessory Lien

2.1 At no time have any of the Defendants regained possession of the Escrowed Funds. At the time the bankruptcy proceeding was dismissed, Defendant, Jeffrey D. Levine was informed by Kate Scholer that the firm's possessory lien over the Escrowed Funds was then in effect and that they would retain possession. The status of the possessory lien has remained unchanged. An affidavit by Jeffrey D. Levine describing in detail the facts underlying the Escrow Account is attached hereto as Exhibit "A", and incorporated herein for all purposes.

2.2 At the time this Court entered its June 29th Order requiring $175,000.00 of the Escrowed Funds deposited into the Court's Registry, such funds remained in the sole possession and control of Kaye, Scholer under their possessory lien. The Defendants in the above-

entitled cause of action are therefore unable to transfer the requested $175,000.00 from the Escrow Account.

III.

Interpleader Action

3.1 On July 1, 1988, Kaye, Scholer filed a Complaint in the United States District Court of the Southern District of New York for the purpose of interpleading the Escrowed Funds in their possession and control. A copy of the Complaint for Interpleader is attached hereto as Exhibit "B", and incorporated herein for all purposes.

3.2 Kaye, Scholer's interpleader action works to satisfy the intent of the Court's June 29th Order in that the $175,000.00 referred to in that order is presently within the control of a Federal District Court, and will remain there pending a resolution of the disagreement between the parties to this lawsuit.

3.3 As per the intent of this Court, the $175,000.00 in question will be protected until the resolution of the present cause of action.

IV.

Lack of Federal Jurisdiction

4.1 The attempted removal of this action was based upon diversity of citizenship under Title 28 U.S.C. 1 1441. When such an attempted removal occurs, the District Court's jurisdiction is limited to a determination of its own jurisdiction and the power to remand the action to the State Court if it appears that the action was removed improvidently and without jurisdiction. Smith v. Dealers Transit Inc., 239 F.Supp. 605 (E.D. N.D. Tenn. 1965). In

the Smith case, the Court held, on facts similar to our own, that since the necessary allegations as to diversity of citizenship between the parties did not appear from the respective records before the Court, that the Court had no jurisdiction to take any action other than a remand of the case back to State Court. Smith at 607.

4.2 In an earlier opinion, a South Carolina District Court held that:

> Unless the case has been properly removed, this Court has no jurisdiction to decide other questions.

Hensley v. Green, 36 F.Supp. 671, 672 (W.D. S.C. 1940).

4.3 Essentially, a District Court can not gain jurisdiction over an action unless there is some basis under 28 U.S.C. §§ 1441-1452. There is no basis in this case for Federal jurisdiction under the appropriate sections. Therefore, the Court's only power is to remand the case for determination in the appropriate forum. It is beyond the jurisdictional powers of this Court to enter an order for the transfer of funds because such an order is beyond the scope of its narrow jurisdictional power to remand a case upon which no Federal jurisdiction lies.

WHEREFORE, PREMISES CONSIDERED, Defendants Jeffrey D. Levine, HBA East, Inc. Ring Network, Inc., Ring Sports Promotions, Inc. and Round One Productions, Inc. respectfully request this Court to

find them not in contempt of Court for failure to comply with the Court's June 29, 1988, Order.

Respectfully submitted,

CADDELL & CONWELL

By: /s/Michael A. Caddell
Michael A. Caddell
Federal ID No. 7426

Leslie McDonnell
Federal ID No. 9136

The Park in Houston Center
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Houston, Texas 77010
(713) 751-0400

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Response to Show Cause Order has been forwarded to all counsel of record via certified mail, return receipt requested, on this 7th day of July, 1988.

/s/ Leslie McDonnell
Leslie McDonnell

17LM.11

APPENDIX Q

NO. 87-010167

JEA BOXING COMPANY, INC., AND PINE HILL INVESTMENTS, INC. d/b/a HOUSTON BOXING ASSOCIATION	§	IN THE DISTRICT COURT OF
VS.	§	HARRIS COUNTY, TEXAS
HBA EAST, LTD., A TEXAS LIMITED PARTNERSHIP, HBA EAST, INC., RING NETWORK, INC., RING SPORTS PROMOTIONS, INC., ROUND ONE PRODUCTIONS, INC., AND JEFFREY D. LEVINE	§	157TH JUDICIAL DISTRICT

PLAINTIFFS' FIRST AMENDED PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW the Plaintiffs, JEA Boxing Company, Inc. ("JEA Boxing") and Pine Hill Investments, Inc. ("Pine Hill"), and bring this cause of action against the Defendants, HBA East, Ltd., a Texas Limited Partnership, HBA East, Inc., Ring Network, Inc., Ring Sports Promotions, Inc., Round One Productions, Inc., and Jeffrey D. Levine. In support of this action, the Plaintiffs would show this Honorable Court and jury the following:

I.

The Plaintiff, JEA Boxing Company, Inc., is a Texas corporation duly authorized to conduct business within Texas, and maintains its principal place of business in Houston, Harris County, Texas.

The Plaintiff, Pine Hill Investments, Inc. d/b/a Houston Boxing Association, is a Texas corporation duly authorized to conduct business within Texas, and maintains its principal place of business in Houston, Harris County, Texas.

The Defendant, HBA East, Ltd., is a Texas Limited Partnership duly authorized to conduct business within Texas. At the time the Original Petition was filed in this action, HBA East, Ltd. maintained its principal place of business in Garden City, New York. HBA East, Ltd. has conducted business in Texas since its effective date of existence in January, 1985 until on or about March, 1987, through and at the substantial direction of HBA East, Inc., acting during that time period as Managing Partner. HBA East, Ltd. has been served with process.

The Defendant, HBA East, Inc., ostensibly is a New York corporation duly authorized to conduct business within Texas, and maintains its principal place of business in Garden City, New York. Since its incorporation, HBA East, Inc. has regularly conducted business in Texas, primarily in Harris County, Texas, through its president and sole shareholder, Jeffrey D. Levine. HBA East, Inc. has been served with process.

The Defendant, Ring Network, Inc., ostensibly is a New York Corporation and does not maintain an office or regular place of business in Texas and, thus, does not have a registered agent for service of process in Texas. However, Ring Network has entered into contracts with

residents of Texas to be performed in whole or in part in Harris County, Texas, which contracts are involved in this action. Accordingly, Ring Network has appointed the Secretary of State of Texas as an agent to accept service of process in its behalf. Copies of Plaintiffs' Original Petition have been forwarded to Ring Network, Inc. in care of Jeffrey D. Levine, 585 Stewart Avenue, Garden City, New York 11530.

The Defendant, Ring Sports Promotions, Inc., ostensibly is a New York corporation and does not maintain an office or regular place of business in Texas and, thus, does not have a registered agent for service of process in Texas. However, Ring sports Promotions has entered into contracts with residents of Texas to be performed in whole or in part in Harris County, Texas, which contracts are involved in this cause of action. Accordingly, Ring Sports Promotions, Inc., has appointed the Secretary of State of Texas as agent to accept service of process in its behalf. Copies of Plaintiffs' Original Petition have been forwarded to Ring Sports Promotions, Inc., in care of Jeffrey D. Levine, 585 Stewart Avenue, Garden City, New York 11530.

The Defendant, Round One Productions, Inc., ostensibly is a New York corporation and does not maintain an office or regular place of business in the State of Texas and, thus, does not have a registered agent for service of process in Texas. However, Round One Productions has entered into contracts with residents of Texas to be performed in whole or in part in Harris County, Texas, which contracts are involved in this action. Accordingly, Round One Productions has appointed the Secretary of State of Texas as its agent to accept service of process in its behalf. Copies of Plaintiffs' Original Petition have been forwarded to Round One Productions, Inc. in care of Jeffrey D. Levine, 585 Stewart Avenue, Garden City, New York 11530.

The Defendant, Jeffrey D. Levine, is a resident of the State of New York. However, Levine regularly conducts business in Houston, Harris County, Texas, individually and in the name of the corporate defendants named above, which corporate defendants are merely the alter ego of Levine. Accordingly, Levine has appointed the Secretary of State of Texas as his agent to accept service of process in his behalf. Copies of the Plaintiffs' Original Petition have been forwarded to Jeffrey D. Levine at 585 Stewart Avenue, Garden City, New York 11530.

Each of the Defendants named above have been served with process and an appearance has been made on behalf of Defendants, HBA East, Inc., Round One Productions, Inc., and Jeffrey D. Levine, by the law firm of Kaye, Scholer, Fierman, Hays & Handler, as is evidenced in the paper filed with the Court on or about June 14, 1988, a true and correct copy of which is attached as Exhibit "C". No appearance has been made by Ring Network, Inc. or Ring Sports Promotions, Inc.

II.

In the latter part of 1984, Jeffrey D. Levine traveled to Houston, Texas, to meet with Pine Hill in an effort to convince it to enter into a partnership arrangement with him or, alternatively, a corporation over which he exercised control. The proposed partnership's purpose was to promote boxing events in New York and New Jersey and in such other places as agreed upon by the partners. At this meeting, Levine, acting in his individual capacity and as corporate representative of Ring Network, Inc., Ring Sports Promotions, Inc., and Round One Productions, Inc., made various representations, which have later proved to be false, as a material inducement to get Pine Hill to enter into this partnership arrangement. Believing all of that which it was told at this meeting by

Levine to be true, Pine Hill agreed to the partnership arrangement and began spending time and money to put the partnership together. Pine Hill would not have entered into this partnership arrangement if it had known of the falsity of Levine's representations. These false representations have substantially damaged Pine Hill.

III.

In December, 1984, Levine formed the Defendant, HBA East, Inc., to act as a general partner in the partnership with Pine Hill. Although Levine has acted in the corporate name of HBA East, Inc. in promoting various boxing events and in other related activities, Levine has never preserved the corporate character of HBA East, Inc. HBA East, Inc. is merely the alter ego of Levine. Levine and HBA East, Inc. are used interchangeably throughout this pleading. Where one of these parties is named, the allegations are meant to extend to each.

IV.

Effective January 31, 1985, HBA East, Inc. and Pine Hill entered into a limited partnership agreement to promote boxing events in the name of HBA East, Ltd., a Texas limited partnership. A true and correct certified copy of the Limited Partnership Agreement creating HBA East, Ltd. is attached hereto and made a part hereof as Exhibit "A". This limited partnership agreement was later amended to admit the Plaintiff, JEA Boxing, as a second general partner and to name the Defendant, HBA East, Inc., as the Managing Partner of the Limited Partnership. A true and correct certified copy of the amended limited partnership agreement is attached hereto and made a part hereof as Exhibit "B". However, even before the creation of HBA East, Ltd., it was agreed between Pine Hill and HBA East, Inc. that their partnership relationship would

be conducted substantially in accordance with the same terms and conditions later memorialized in the limited partnership agreements.

V.

As Managing Partner of HBA East, Ltd., HBA East, Inc. is restricted from engaging in any business activity in competition with the business and activities of HBA East, Ltd. or that would in any way be detrimental to the partnership or constitute a partnership opportunity. Thus, all business transactions in which HBA East, Inc. has participated in the field of boxing promotions since January, 1985, are for the benefit and belong solely to HBA East, Ltd. Not only was this agreement contained in the limited partnership agreements attached hereto, this agreement was also the agreement among all the parties to this action even before the limited partnership was created. It has now been discovered that HBA East, Inc. has acted in breach of both its contractual agreement and its fiduciary relationship established between the parties to this action, the result of which is great and has substantially damaged the Plaintiffs.

VI.

At the requests of HBA East, Inc., Pine Hill has repeatedly sent substantial sums of money in excess of $1.1 million to HBA East, Inc. in order to fund the promotion of various boxing events and to generate revenues for the benefit of the limited partnership since January, 1985. The limited partnership agreement requires HBA East, Inc., as Managing Partner of the limited partnership, to account for all moneys received and expended by the limited partnership as well as to account for and to keep the other partners informed of all contracts, business opportunities, and other advantageous business relationships established for the partnership's benefit.

VII.

Further, the limited partnership agreement provides that all monies advanced to the limited partnership by Pine Hill will first be paid out of the profits generated by the partnership before any profits are paid out to the partners. Although over $1.1 million has been advanced by Pine Hill to HBA East, Inc. for the benefit of the partnership, none of this money has been repaid. The Plaintiffs have made repeated requests to HBA East, Inc., through Levine, to provide an accounting and other reporting of the monies he has received that belong to the limited partnership, however, HBA East, Inc. has repeatedly and adamantly refused to make such an accounting. It has now been discovered that the funds that were forwarded by Pine Hill to HBA East, Inc. have been commingled in other accounts and have been used for the own self-dealing of HBA East, Inc., Levine, and other corporations and business entities over which Levine maintains control in breach of HBA East, Inc.'s contractual relationship with and fiduciary obligations owed to the Plaintiffs. Further, HBA East, Inc.'s actions and that of Levine's in this regard amount to a fraud practiced on the Plaintiffs. This conduct has caused substantial damage to the Plaintiffs.

VIII.

HBA East, Inc. is contractually obligated by the limited partnership agreements to allow each of the other partners a reasonable opportunity to inspect, copy, and audit all books, records, contracts, and other documents that affect the partnership's business. The Plaintiffs have made repeated requests to HBA East, Inc. to examine these documents to determine the financial posture of the partnership's business as well as all business opportunities that may affect the business. HBA East, Inc. has

repeatedly refused the Plaintiffs the opportunity to make this investigation although it has on numerous occasions recognized the Plaintiffs' right to do so. This conduct constitutes a breach of the contractual agreement HBA East, Inc. has with the Plaintiffs as well as the fiduciary obligations owed to the Plaintiffs. In an effort to achieve justice for the Plaintiffs so that they may determine the exact amounts owed them by the Defendants and, further, to discover the extent of the fraud and misrepresentations practiced on them, it is necessary that the Court require that the Defendants produce books, records, accounting ledger, files, bank account statements, audit statements, income tax returns and all other documents that may have a bearing, directly or indirectly, on the financial condition of the Defendants and their past financial affairs since 1984.

IX.

HBA East, Inc. has breached its agreement with the Plaintiffs in their partnership arrangement with them by self-dealing for its own benefit through Levine. HBA East, Inc. has solely used the more than $1.1 million in funds forwarded to it that were to be used for the benefit of the limited partnership to generate profits that he has retained for himself and the corporate defendants he controls. HBA East, Inc. has made boxing promotion and other contracts in its own name solely for its own benefit when those contracts should have been made in the name of HBA East, Ltd. for the benefit of all partners in the partnership. First, boxing promotion contracts with various fighters such as Tony Tucker, Carl Williams, Vincent Burgese, Roger Mayweather, Tony Martin, and Hector Camacho were made in the name of HBA East, Inc. (or in Levine's name individually or in the name of one of his corporate alter egos) with no intention of letting the Plaintiffs, as partners, receive their rightful share of and benefits from those contracts. Second, HBA East, Inc.

has made contracts with various hotels in Atlantic City. New Jersey, and other cities in its own name and for its own benefit substantially relying on the funding and contacts of the Plaintiffs, as partners, to secure these contracts. Third, HBA East, Inc. has made contracts with Madison Square Garden in its own name and for its own benefit substantially relying upon the funding and contacts of the Plaintiffs, as partners, to secure these contracts. Fourth, HBA East, Inc. has made contracts with various television networks and video reproduction companies in its own name and for its own benefit substantially relying upon the funding and contacts of the Plaintiffs, as partners, to secure these contracts. Never did HBA East, Inc. inform the Plaintiffs that these contracts were being made in its own name; to the contrary, it repeatedly misled the Plaintiffs into believing the contracts were made in the partnership's name and/or for its benefit. However, HBA East, Inc. now disavows the existence of any type of partnership arrangement with the Plaintiffs whatsoever and refuses to allow the Plaintiffs to receive their rightful share of the benefits of each of these contracts, business opportunities, and advantageous business relationships which are in excess of $1 million. This conduct amounts not only to a breach of its contractual arrangement with the Plaintiffs but also fraud. The Plaintiffs have suffered substantial damages by reason of the Defendants' conduct in this regard.

X.

All of the contracts, potential contracts, business opportunities, and advantageous business relationships made by HBA East, Inc. (or by Levine individually or in the name of one of his corporate alter egos) with fighters, hotels, television networks, video companies, and other groups and corporations connected, directly or indirectly, to promotion or boxing events belong to and are the sole property of the partnership, whether it be found to be a

general or limited partnership. HBA East, Inc., nevertheless, has received all of the revenues from these contracts and used them solely for its own personal benefit and for the benefit of Levine. Not only is this a breach of the limited partnership agreement, it is a breach of the fiduciary responsibilities HBA East, Inc. and Levine owe to the Plaintiffs. The Defendants' conduct in this regard has caused the Plaintiffs substantial damage.

XI.

All contracts made and business opportunities developed by the Defendants since January, 1985, are the property of HBA East, Ltd. These include promotional contracts with boxers, hotels, casinos, television networks, video production companies, and various other corporations and business entities. Nevertheless, the Defendants have tortiously interfered with those contracts to the disadvantage of the partnership and, more particularly, the Plaintiffs' investment in the partnership. The Plaintiffs by reason of this interference have suffered significant damages, and if this conduct continues, will suffer further damages.

XII.

HBA East, Inc. and HBA East, Ltd. conspired to breach their contractual and fiduciary obligations owed to the Plaintiffs as stated above for the ultimate benefit of HBA East, Inc. and Levine. This conspiratorial conduct has caused and continues to cause the Plaintiffs significant damages.

XIII.

It is necessary that a receiver be appointed to take possession of and responsibility for the assets of HBA East, Ltd., HBA East, Inc., Ring Network, Inc., Ring Sports

Promotions, Inc., Round One Productions, Inc., and Jeffrey D. Levine; to manage and operate the partnership business established between the parties to this action; to collect accounts receivable; to keep a true, complete, and accurate record of the receipts of the partnership business; to pay all approved creditors of the partnership; and to pay to Plaintiffs all sums due under the partnership agreement. If a receiver is not appointed, because of the Defendants conduct stated hereinabove, the partnership business and the assets thereof are in danger of being taken, removed, materially injured, or destroyed by persons who have no right to compromise the value of those assets to the Plaintiffs' detriment.

XIV.

By virtue of the wrongful actions taken by the Defendants in the past and the irreparable harm that will occur in the future if these actions were allowed to proceed as before, the Plaintiffs request that this Court enjoin the Defendants from transferring any of the assets possessed by HBA East, Inc., Ring_Network, Inc., Ring Sports Promotions, Inc., Round One Productions, Inc., or Levine, unless transferred directly to the Plaintiffs, to the Court's Registry, to a receiver appointed by the Court, or to one agreed upon among the parties to this action.

XV.

By virtue of the misappropriations of funds and fraudulent misrepresentations made by the Defendants, the Plaintiffs are entitled to recover and seek to recover in this action punitive damages to deter the Defendants from engaging in similar activities in the future and to provide an example to others who may seek to engage in the same egregious conduct as the Defendants have in this cause.

XVI.

On or about March 27, 1987, the Defendants, Jeffrey D. Levine, HBA East, Inc., and Round One Productions, Inc., filed for bankruptcy under Chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the Eastern District of New York solely to avoid the jurisdiction of this Court over the matters raised in this action. The Defendants' intent by filing bankruptcy was solely to remove this action from the courts of this State to the courts in Brooklyn, New York, in an effort to defeat the contractual obligations owed the Plaintiffs. The filing of the bankruptcy action automatically stayed the action in this Court by reason of the operation of Section 362 of the United States Bankruptcy Code. 11 U.S.C. §362. In response, the Plaintiffs' filed an action to dismiss this bankruptcy action for the reason that it was filed in bad faith solely to avoid the jurisdiction of the Texas courts. On June 3, 1988, the United States Bankruptcy Court held that the Defendants Levine, HBA East, Inc., and Round One Productions, Inc. wrongfully used the bankruptcy courts to avoid the Texas state court action, filing their Chapter 11 bankruptcy petition in bad faith. The bankruptcy court ordered that their Chapter 11 actions be dismissed for those reasons. A true and correct copy of the bankruptcy court's decision and order is attached hereto as Exhibit "D".

XVII.

During the pendency of the Plaintiff's Motion to Dismiss the Defendants' bankruptcy actions, one of the boxers promoted by HBA East, Ltd. fought, reaping the partnership substantial profits. In the Bankruptcy courts' chambers, the Defendants' attorneys, Kaye, Scholer, Fierman, Hays & Handler, agreed to deposit into its firm escrow account $175,000 of these profits to be held until the Bankruptcy Court decided to whom these profits

belonged if the Court first found that the bankruptcy action was properly before it. As a consequence of the Bankruptcy Court's dismissal of the bankruptcy action, it will lose jurisdiction to direct the manner in which the amount held in the escrow account, will be disposed. Therefore, the $175,000 held in escrow by the Defendants' attorneys may be returned to the Defendants for whatever disposition the Defendants desire even though none of that amount belongs to the Defendants if a mandatory injunction is not issued immediately by this Court directing that the escrowed amount be paid into this Court's Registry.

XVIII.

On June 23, 1988, the bankruptcy court ordered in open court that the escrow arrangement be dissolved on Wednesday, June 29, 1988 at 5:00 p.m. and that the escrow agent be authorized at that time to turn the escrow funds over to Defendants. The bankruptcy Judge delayed the effective date of the order until Wednesday, June 29, 1988 at 5:00 p.m. for the express 9urpose of providing counsel for the Plaintiffs time to seek a restraining order in this action requiring the funds to be paid into this Court's Registry.

XIX.

The Defendants, by filing the bankruptcy action, have taken the position that they are insolvent and have little if any money to operate and function. If the escrow funds are released to the Defendants it is very probable that the Plaintiffs will never be able to recover this money to which they area entitled. Therefore, it is necessary that an immediate Temporary Restraining Order be issued without notice to the Defendants, requiring the Defendants to instruct their attorneys, agents, and any other persons acting in their behalf, to pay into the Registry of the

District Court of Harris County immediately the $175,000.00 held in escrow by Kaye, Scholer, Fierman, Hays & Handler, including all interest accumulated on the same; and, further, to require Kaye, Scholer, Fierman, Hays & Handler to deposit in the Registry of this Court the $175,000.00 escrowed amount irrespective of the instructions received by the Defendants.

XX.

Further, the Plaintiffs are entitled to a temporary injunction requiring the Defendants and their attorneys, agents, and other persons acting for or in their behalf to keep on deposit in the Court's Registry the $175,000.00, plus interest accumulated thereon, until it is determined finally to whom this money shall be paid.

WHEREFORE, PREMISES CONSIDERED, the Plaintiffs, JEA Boxing Company, Inc. and Pine Hill Investments, Inc., pray that the Defendants, HBA East, Ltd., a Texas Limited Partnership, HBA East, Inc., Ring Network, Inc., Ring Sports Promotions, Inc., Round One Productions, Inc., and Jeffrey D. Levine, having been summoned and required to answer the Plaintiffs' Original Petition recover their damages from the Defendants arising out of the above enumerated contractual breaches and fraud practiced on the Plaintiffs jointly and severally from the Defendants; that the Plaintiffs receive all of their rightful interests in various promotional contracts made in the name of any one of the Defendants; that the Defendants account to the Plaintiffs in full for the expenditures of funds in the operation of HBA East, Ltd. and HBA East, Inc.; that the Plaintiffs, recover all monies funded by Pine Hill to the partnership through Levine and HBA East, Inc.; that the Plaintiffs recover all consequential damages sustained by them by reason of the Defendants' breaches of contract and fraud practiced on the Plaintiffs; that Plaintiffs recover all lost profits that

they have sustained by reason of the Defendants' breaches of contract and fraud; that Plaintiffs recover punitive damages from the Defendants; that Plaintiffs recover prejudgment and post-judgment interest from the Defendants in the maximum amount provided by law; that the Plaintiffs be granted the injunctive relief pled for hereinabove; and that the Plaintiffs recover all costs of court and have such other and further relief to which they may be justly entitled.

Respectfully submitted,

VINSON & ELKINS

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THE STATE OF TEXAS §
§
COUNTY OF HARRIS §

BEFORE ME, the undersigned Notary Public, on this day personally appeared H. Dixon Montague, who being by me duly sworn on his oath deposed and said that he is the attorney for Plaintiffs in the above-entitled numbered cause; that he has read the above and foregoing Plaintiffs' First Amended Petition and that every statement contained therein is within his personal knowledge and true and correct.

/s/ H. Dixon Montague
H. Dixon Montague

SUBSCRIBED AND SWORN TO BEFORE ME, on the 29th day of June, 1988 to certify which witness my hand and official seal.

/s/ Marianne Guzman
Notary Public in and for
the State of Texas

My Commissions Expires:
July 28, 1988

CERTIFICATE OF SERVICE

This is to certify that on this the 29th day of June, 1988 a true and correct copy of the above and foregoing Plaintiffs' First Amended Petition was delivered by messenger to Mr. Michael A. Caddell, Caddell & Conwell, 1331 Lamar, Suite 1070, The Park in Houston Center, Houston, Texas 77010-3027; and by federal express mail to Mr. Arthur Steinberg, Kaye, Scholer, Fierman, Hays & Handler, 425 Park Avenue, New York, New York 10022

/s/ H. Dixon Montague
H. Dixon Montague

FILED
MAY 23 1991
OFFICE OF THE CLERK

NO. 90-1658

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

HBA EAST LIMITED, ET AL,
Petitioners

v.

JEA BOXING COMPANY, ET AL,
Respondents

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT CONCERNING CORPORATE RESPONDENTS

The Respondents in this case are (1) JEA Boxing Company, Inc. and (2) Pine Hill Investments, Inc., d/b/a Houston Boxing Association. Neither Respondent has any parent or subsidiary companies.

NO. 90-1658

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

HBA EAST LIMITED, ET AL,
Petitioners

v.

JEA BOXING COMPANY, ET AL,
Respondents

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JURISDICTION

Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1257(a). This Court, however, has no jurisdiction of Petitioners' constitutional complaint because Petitioners waived that complaint in the Texas state court system. As the Court of Appeals for the First District of Texas held, Petitioners waived their point of error complaining that lack of notice of the default judgment hearing violated their due process rights under the Fourteenth Amendment to the United States Constitution by "fail[ing] to urge this point of error before the trial court in their motion for new trial" as required by Texas Rule of Ap-

pellate Procedure 52(a). Pet. App. B at B-11. In denying Petitioners' Application for Writ of Error, the Supreme Court declined to review the court of appeals' holding. Pet. App. A.

Because Petitioners' federal claim was not adequately presented in the state court system, this Court has no jurisdiction to consider that claim now. *See* p. 12-18, *infra*.

STATEMENT OF THE CASE

Respondents filed their Original Petition on March 3, 1987 in Texas state court alleging that Petitioners bilked them out of millions of dollars through a series of wrongful acts, including breaches of fiduciary duty, breaches of partnership agreements, diversion of business opportunities, tortious interference with contract, and fraud. Respondents claimed that Petitioners swindled them in connection with various transactions and sought, among other things, dissolution of the partnership with Petitioners, all rights and interest in the partnership's assets, and actual and punitive damages. Pet. App. E.

All Petitioners were served with this lawsuit by March 6, 1987. *See* Petition for a Writ of Certiorari to the Supreme Court of the State of Texas at 3 (hereinafter "Petitioners' Brief at ____"). Yet for some two years after Respondents filed suit, Petitioners managed to dodge Respondents' claims in the trial court by flagrantly abusing the judicial system. Shortly before Petitioners' answers were due, three of the Petitioners filed bankruptcy petitions in New York. The New York court dismissed the bankruptcy action as having been filed in bad faith. Undaunted, Petitioners continued their efforts to avoid the Texas judicial system by asking the bankruptcy judge to transfer the case to a federal district court in New York, by filing

parallel proceedings in New York state court and removing the Texas action to federal court. All of Petitioners' procedural machinations came to naught: the bankruptcy judge refused to transfer the action, the New York state court dismissed the parallel proceeding, and the Texas federal district court remanded the case to state court.

Nine months after this case had been remanded to state court and two years after Petitioners had been properly served with process in the state court proceeding, Petitioners still had not filed answers. Accordingly, on April 1, 1989, the state court entered a default judgment against all Petitioners. Petitioners appealed, and the court of appeals affirmed as to the Petitioners that had not filed bankruptcy, but reversed as to the Petitioners that had filed bankruptcy. Pet. App. B. The Texas Supreme Court denied Petitioners' Application for Writ of Error. Pet. App. A.

A. Petitioners' Bad Faith Bankruptcy

On March 27, 1987, three days before Petitioners' answers were due in the Harris County District Court in Houston, Texas, three of the Petitioners (i.e., HBA East, Inc., Round One Productions, Inc., and Levine), filed Petitions for Chapter 11 bankruptcy reorganization in the Eastern District of New York. By filing the bankruptcy proceedings, the Bankruptcy Petitioners were able to invoke the "automatic stay" provision of the Federal Bankruptcy Code, 11 U.S.C. § 362, so as to avoid answering in the Texas state court action. Petitioners were represented in the bankruptcy by the Kaye, Scholer law firm of New York, New York. The remaining three Petitioners, HBA East, Ltd., Ring Network, Inc., and Ring Sports Promotions, Inc., did not file petitions in bankruptcy, but

neither did they file answers in the Harris County District Court.[1]

On April 24, 1987, Respondents instituted adversary proceedings in the New York bankruptcy court, re-alleging in that forum the same state law claims that they had asserted in the Texas state court action. Respondents also moved to dismiss the bankruptcy action as having been filed in bad faith. Judge Jerome Feller, United States Bankruptcy Judge, required Petitioner HBA East, Inc. to place existing funds totalling $175,000 in escrow pending further orders of the court. After holding four extensive evidentiary hearings, Judge Feller dismissed the bankruptcy action as having been filed in bad faith, declaring:

> The filing of the [bankruptcy] petitions on March 27, 1987 was *strategically timed and calibrated to events in Texas*. . . . By filing on the eve of their *answering date in the Texas Action* and not before, the Debtors were able to use the automatic stay as a sword to *avoid appearing in that lawsuit*, and were able to shift the forum of their disputes with Movants to this Court, a forum they believed might be more favorable to their plight. As a general rule where, as here, the timing of a filing of a Chapter 11 petition is such that there can be no doubt that the primary, if not sole, purpose of the filing was a *litigation tactic*, the petition may be dismissed as *not being filed in good faith*.
>
> * * *
>
> Where, as here, the totality of facts and circumstances rise to a level of egregiousness compelling a conclusion that the reorganization process is being

1. HBA East, Inc., Round One Productions, Inc., and Levine will at times be referred to as the "Bankruptcy Petitioners" and HBA East, Ltd., Ring Network, Inc. and Ring Sports Promotions, Inc. will at times be referred to as the "Non-Bankruptcy Petitioners."

> perverted, we are constrained to dismiss the Chapter 11 petitions as not being filed and maintained in good faith.

App. A at A-3-A-4. (emphasis added) (footnotes omitted). Excerpts from Judge Feller's bankruptcy decision are attached hereto as App A.

B. Petitioners' Attempt to Transfer the Case to the New York Federal and State Courts

On June 17, 1988, two weeks after Judge Feller dismissed the bankruptcy action, the Bankruptcy Petitioners moved Judge Feller to transfer the adversary portion of the proceeding from the bankruptcy court to the United States District Court for the Eastern District of New York. Judge Feller denied that motion on June 23, 1988, noting the absence of any legal authority empowering a bankruptcy judge to order a transfer. App. B at B-10-B-11. Excerpts from the record relevant to Petitioners' attempt to transfer the case to the New York federal and New York state courts are attached hereto as App. B. Chastising the Bankruptcy Petitioners for filing their frivolous motion to transfer, Judge Feller reminded them that their bankruptcy action had been found "to be a misuse and abuse of the bankruptcy reorganization process" and that their bankruptcy action was "dismissed as not being filed in good faith." App. B at B-11.

On June 30, 1988, one week after Judge Feller denied the Bankruptcy Petitioners' motion to transfer their bankruptcy action to a New York federal court, Petitioners filed an action against Respondents in New York state court. On Respondents' motion, the New York state court later dismissed the action, holding that it was merely an attempt to litigate matters already pending in the Texas state court action. App. B.

C. Petitioners' Attempted Removal of the Case to Texas Federal Court in Houston, Texas

Meanwhile, instead of answering in the Texas state court litigation after Judge Feller dismissed the bad faith bankruptcy on June 3, 1987, Petitioners retained Texas attorney Michael Caddell to remove the case to a Texas federal court. On June 27, 1988 (nearly 30 days after dismissal of the bankruptcy and the lifting of the automatic stay), Petitioners removed the Texas state action to federal court. Pet. App. F. On June 29, 1988, Federal Judge Lynn Hughes held an in-chambers conference with the parties during which Respondents' motion to remand was argued. App. C at C-3. A copy of Judge Hughes' docket sheet is attached hereto as App. C. Representing Petitioners were (1) Kaye, Scholer attorneys, who had represented Petitioners in the New York bankruptcy and were included in the conference by telephone, and (2) Texas attorney Michael Caddell. Pet. App. O. During the conference, Judge Hughes ordered the case to be remanded.

D. Petitioners' Notice of the Texas Federal Court's Remand Order

On June 30, 1988, Judge Hughes signed an Order remanding the case to the Harris County District Court. Pet. App. G. Although Petitioners insist that they "never received written notice that the remand order had been filed in Harris County," (Petitioners' Brief at 3), the truth is that Petitioners, by virtue of participating in the remand hearing, had immediate notice of the remand, and that Texas attorney Michael Caddell was notified of the remand Order by the Federal court clerk. App. C at C-2.

Before signing the remand Order, Judge Hughes directed that the $175,000 in escrow in New York be deposited in the registry of Judge Hughes' court. Although Petitioners assert that they deposited the $175,000 in the federal court's registry (Petitioners' Brief at 3), the truth is that Petitioners' New York bankruptcy counsel Kaye, Scholer filed an interpleader proceeding in New York federal court on July 1, 1988, and deposited the $175,000 in that New York interpleader action.

In response to the interpleader action, Respondents filed a motion in Judge Hughes' court to hold Petitioners in contempt for disregarding Judge Hughes' Order to deposit the funds in the registry of Judge Hughes' court. In their written oppositions to Respondents' contempt motion, Kaye, Scholer and attorney Caddell argued that the June 30, 1988 remand Order "divested the Court [Judge Hughes] of all jurisdiction over the case" and that "[b]y prior Order, this case was remanded to the 157th Judicial District Court for Harris County, Texas. . . ." App. D. Excerpts from Kaye, Scholer's and Mr. Caddell's written oppositions to Respondents' contempt motion are attached hereto as App. D.

Furthermore, in a hearing on the motion for contempt before Judge Hughes on July 8, 1988, Mr. Caddell repeatedly argued that because the case had been remanded to Texas state court, Judge Hughes lacked jurisdiction to hear the motion on contempt.

> Judge Hughes: I haven't signed the remand order, have I?
>
> Mr. Caddell: Yes. You signed it on June 30 [1988], which remanded the case to state court.

App. E at E-2 - E-3. A copy of the relevant portions of the July 8, 1988 hearing before federal Judge Hughes is attached hereto as App. E. Thus, as of the July 8, 1988 contempt hearing, Petitioners were clearly aware that the case had been remanded to state court.

Judge Hughes held that he had jurisdiction to find Petitioners and Kaye, Scholer in contempt for disobeying his Order to transfer funds to his court. App. E at E-4. As Judge Hughes stated:

> I am convinced I still have jurisdiction to keep *your bandits* from running off with the money.
>
> I don't think there is the slightest doubt that I have authority to freeze control of the [res] while the *bad faith meritless machinations of your clients are returned to their proper home.* . . .
>
> [Judge Feller] knew a *skunk* when he saw one, and we are just as street wise as they are in Brooklyn.
>
> [Petitioners] . . . had no intention of complying [with Judge Hughes' Order] without trying to come up with some *other gimmick*. They don't want to litigate the merits.

Id. (emphasis added). It was not until after the July 8, 1988 contempt hearing that Petitioners finally deposited the $175,000 in the registry of Judge Hughes' court.

By letter dated July 19, 1988, Judge Hughes advised Judge Salazar, the Harris County District Court Judge, that the $175,000 would be transferred to the registry of the state court. Recognizing the effectiveness of the remand, Judge Hughes wrote to Judge Salazar as follows:

> *Now that the case is again fully pending before you,* it appears to me that the sensible thing is for me to

> transfer the $175,000 plus interest I hold in the registry to your registry.

App. F. (emphasis added). A copy of the letter from Judge Hughes to Judge Salazar is attached to this brief as App. F. By sending a copy of this letter to Mr. Caddell, Judge Hughes himself gave Petitioners' trial counsel written notice of the remand of the case to the state court.

E. The Default Judgment

Despite these repeated notices to Petitioners of Judge Hughes' remand Order, Petitioners still failed to answer or appear in the Texas action. Accordingly, the trial court entered a default judgment against all Petitioners on April 1, 1989, nine months after this case had been remanded to the state court and two years after Petitioners had been properly served in the Texas state action. The Judgment awarded Respondents, jointly and severally, $2,215,595 in actual damages, $6,645,785 in punitive damages, and post-judgment interest, along with the $175,000 plus interest which had been on deposit in the federal court's registry. The Judgment also provided for the dissolution of the partnership upon which Respondents' underlying lawsuit was based, and awarded Respondents all rights and interest to the partnership assets. Pet. App. C. The Judgment, however, incorrectly stated that Petitioners had appeared in the case. Pet. App. C at C-1.

F. Petitioners Failed to Complain of Lack of Notice Until They Filed Their Amended Brief with the Court of Appeals

On April 28, 1989, Petitioners filed their Motion for New Trial; that motion was denied on May 10, 1989.

Petitioners' *sole complaint* before the trial court was that the Judgment was defective because Petitioners' answers were not due pursuant to Rule 237a of the Texas Rules of Civil Procedure. Pet App. H at H-1 - H-3. On August 25, 1989, Petitioners filed their appeal bond and appellate brief with the court of appeals, asserting only those points of error that they had raised in their Motion for New Trial. Pet App. J. In fact, Petitioners did not raise their present constitutional complaint until they filed an amended brief with the court of appeals on October 2, 1989. Petitioners' Brief at 5; Pet. App. K at K-8, K-11 - K-12.

The court of appeals affirmed the default judgment entered against the *Non-Bankruptcy Petitioners* and correctly held that they had waived any constitutional complaint that they might have had concerning lack of notice of the hearing on the default judgment by failing to raise that complaint in the trial court.

Because the court of appeals concluded that it had to reverse the Judgment against the *Bankruptcy Petitioners* on other grounds anyway, the court declined to consider whether the *Bankruptcy Petitioners* had also waived their constitutional complaint concerning lack of notice. Pet. App. B at B-11.

The court held that because the Bankruptcy Petitioners' answer was not yet due when the Judgment was rendered, the Judgment was invalid as to them. *Id.* Although the court refused to reach the issue of whether the Bankruptcy Petitioners had waived their constitutional rights, the court's analysis concerning the Non-Bankruptcy Petitioners' waiver of their constitutional claims applies with equal force to the waiver of constitutional claims by the Bankruptcy Petitioners.

By denying writ, the Texas Supreme Court declined to review the court of appeals' decision. Pet. App. A.

REASONS FOR DENYING THE WRIT

Petitioners present three questions for this Court's review. The first question simply inquires whether failure to give notice of a default judgment hearing violates a defendant's right to due process under the Fourteenth Amendment to the United States Constitution once the defendant has made an appearance in the case. Petitioners' Brief at i. Respondents do not dispute that the answer to that question is yes.

Petitioners' second question asks whether the right to complain of a due process violation can be waived by a Texas defendant before the Texas Supreme Court, following a United States Supreme Court's decision, holds that the right to due process is available to that defendant under the precise circumstances at issue in this case. *Id.* In presenting this question, Petitioners assume the burden of demonstrating that the Texas Supreme Court decision, upon which Petitioners rely, made new law. Petitioners cannot meet that burden; hence, Petitioners waived their due process complaint by failing to present that complaint to the trial court.

Petitioners' third question asks whether Petitioners appeared in this case. *Id.* In presenting this question, Petitioners assume the burden of demonstrating that they made a pre-default appearance in this case. Because the right to notice of a default judgment hearing applies only to defendants *who have appeared* in an action, unless Petitioners can show that they appeared in the Texas state court action before the default judgment hearing, then

Petitioners were not entitled to notice of that hearing. Petitioners cannot meet that burden because they filed no answer to the Texas state court action and made no other appearance in the Texas state action before the default judgment hearing.

A. This Court Has No Jurisdiction to Consider Petitioners' Constitutional Complaint Because Petitioners Failed to Present that Complaint to the Trial Court

Petitioners assert that this Court has jurisdiction to issue Petitioners a Writ of Certiorari to the Texas Supreme Court pursuant to 28 U.S.C. § 1257(a). Petitioners' Brief at 2. This Court, however, will not review a final judgment of a state court pursuant to that statute unless "the record . . . shows . . . that the federal claim was adequately presented in the state system." *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 550 (1987) (quoting *Webb v. Webb*, 451 U.S. 493, 496-97 (1981)). This Court has no jurisdiction to decide a federal constitutional issue which was not properly preserved in the state court system. Thus, in order to maintain jurisdiction on the ground that a state court has denied a federal right, the right

> must not only be specially set up or claimed, but at the proper time and in the proper way. The proper time is in the trial court whenever that is required by the state pratice, in accordance with which the highest court of a State will not revise the judgment of the court below on questions not therein raised.

Mutual Life Ins. Co. v. McGrew, 188 U.S. 291, 308 (1903).

Where, as here, the Texas court of appeals refused to hear Petitioners' constitutional claim because that claim was not presented to the trial court and was instead raised for the first time before the court of appeals, this Court has no jurisdiction to decide that delinquently-raised claim. *Exxon Corp. of Eagerton*, 462 U.S. 176, 181 n.3 (1983) (holding that this Court had no jurisdiction to hear constitutional claim not presented to the Alabama trial court but presented for the first time on appeal). *See also Board of Directors of Rotary Int'l*, 481 U.S. at 550.

B. Pursuant to Texas Appellate Practice, Petitioners Waived Their Due Process Complaint.

Petitioners concede that they did not urge their due process complaint (i.e., that the default judgment should be set aside because Petitioners received no notice of the default judgment hearing) in the trial court and they asserted that complaint for the first time in an amended brief filed with the court of appeals on October 2, 1989. Petitioners' Brief at 4; Pet. App. K. They insist, however, that no waiver occurred because their constitutional complaint was allegedly based upon a new rule of law announced by the Texas Supreme Court on September 20, 1989, *after* Petitioners filed their Motion for New Trial on April 28, 1989 and *after* Petitioners filed their first appellate brief with the court of appeals on August 25, 1989. Petitioners' Brief at 4. According to Petitioners, the Texas Supreme Court established a new constitutional right to notice of default judgment proceedings in *LBL Oil Co. v. International Power Services, Inc.*, 777 S.W.2d 390 (Tex. 1989). Petitioners' Brief at 4.

Petitioners' tardy assertion of purported constitutional error came too late for appellate consideration. First,

Petitioners state that their new-found constitutional complaint is based solely on the recent Texas Supreme Court decision in *LBL Oil*. But *LBL Oil* did not address the timeliness of the constitutional challenge. The defaulted defendants in *LBL Oil*, unlike Petitioners here, appealed by writ of error to the court of appeals,[2] and therefore, could timely urge the constitutional challenge for the first time on appeal. This case, unlike *LBL Oil*, involves a direct appeal and not an appeal by writ of error. Second, contrary to Petitioners' assertions, *LBL Oil* did not create any new rights; the decision merely confirmed what had long been the law in Texas. See p. 16-18 *infra*.

Well-settled Texas law is clear that "[i]n order to preserve a complaint for appellate review, a party must have presented to the trial court a timely motion, *stating the specific grounds* for the ruling that it desired the court to make, and must have obtained a ruling on its motion. TEX R. APP. P. 52(a)." *Mark Products U.S. Inc. v. Inter-First Bank Houston, N.A.*, 737 S.W.2d 389, 396 (Tex. App.—Houston [14th Dist.] 1987, writ denied) (emphasis added). *See also St. Gelais v. Jackson*, 769 S.W.2d 249, 251 (Tex. App.—Houston [14th Dist.] 1988, no writ); *Fish v. Bannister*, 759 S.W.2d 714, 722 (Tex. App. —San Antonio 1988, no writ); *Notgrass v. Equilease Corp.*, 666 S.W.2d 635, 637 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.).

Nor is the waiver analysis altered because the complaint in question asserts a violation of constitutional due process rights. The waiver principle is equally applicable to delinquently asserted constitutional complaints: it is set-

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2. One of the prerequisites for a writ of error under Texas law is that a party bringing that Writ of Error must not have participated in the trial proceedings. TEX. R. APP. P. 45(b).

tled law that "[a] litigant by his act or failure to act, may waive a constsitutional right . . . ." *Mercer v. Philips Nat'l Gas Co.*, 746 S.W.2d 933, 936 (Tex. App.—Austin 1988, writ denied). *See Curtis Publishing Co. v. Butts*, 388 U.S. 130, 143 (1967) (even a constitutional objection is waived by failing to raise it at a proper time in the state court).

Where a constitutional challenge is not presented to the trial court, the appellate court "will not consider it for the first time on appeal." *Elbar Inc. v. Claussen*, 774 S.W.2d 45, 53 (Tex. App.—Dallas 1989, no writ). *See Doctor's Hosp. v. West*, 765 S.W.2d 812, 815 (Tex. App. —Houston [1st Dist.] 1988, no writ) (due process violation not properly before appellate court where not urged to trial court); *Walker v. Employees Retirement System*, 753 S.W.2d 796, 798 (Tex. App.—Austin 1988, writ denied) ("[a] constitutional challenge not raised properly in the trial court is waived on appeal"); *Zaragosa v. State*, 721 S.W.2d 429, 429 (Tex. App.—Corpus Christi 1986, no writ) ("[f]ailure to object or otherwise apprise the trial court of one's claim waives even constitional error").

What happened here is clear. Petitioners discovered a new ground of purported constitutional error based upon reading a recent decision of the Texas Supreme Court in which another litigant in another case had timely urged a constitutional complaint. This discovery was made after the case was already pending before the court of appeals. If Petitioners—all of whom have admitted they were properly served with process—had a legitimate constitutional challenge to the default judgment entered in this case, they relinquished their complaint when they failed to bring that challenge to the attention of the trial court.

C. *LBL Oil* Did Not Make New Law

According to Petitioners, they did not have to apprise the trial court of their constitutional challenge because that challenge was based upon a new rule of law established by the Texas Supreme Court in *LBL Oil* after the trial court's jurisdiction had expired. Petitioners' Brief at 4-5, 9-10. But the Texas Supreme Court's decision in *LBL Oil* did not announce any new rule of law. For at least twenty-five years, Texas courts have recognized that a defendant who has appeared in a lawsuit must be given notice before default.

In *Investors Diversified Services, Inc. v. Brunner,* 366 S.W.2d 810 (Tex. Civ. App.—Houston 1963, writ ref'd n.r.e.), the court of appeals rejected the defendant's contention that a letter in the court's file constituted an answer, but in doing so, the court noted:

> If the letter in question can be construed as an answer or appearance . . . the garnishment proceeding should have been set for trial as a contested case and *notice given* as in other cases . . . *before taking a default judgment.*

Id. at 815 (emphasis added).

A simple reading of the *LBL Oil* decision itself also demonstrates that the Texas Supreme Court was *not* making new law. In a short *per curiam* opinion written without oral argument, the Texas Supreme Court reversed a default judgment in express reliance on two 1988 cases holding that a defendant has a constitutional right to notice of a trial setting. In *Peralta v. Heights Medical Center,* 485 U.S. 80, 84 (1988), this Court held that a defendant has a constitutional due process right to notice of a trial setting, and the Texas Supreme Court likewise

so held in *Lopez v. Lopez*, 757 S.W.2d 721, 723 (Tex. 1988).

Based on the *Peralta* and the *Lopez* decisions, the *LBL Oil* Court stated:

> Once a defendant has made an appearance in a cause, he is entitled to notice of the trial setting as a matter of due process under the Fourteenth Amendment to the Federal Constitution as set forth in *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80 . . . (1988). *See Lopez v. Lopez*, 757 S.W.2d 721, 723 (Tex. 1988). The record here establishes that [defendant] had no actual or constructive notice of the hearing on the motion for default judgment, which effectively was his trial setting since it was dispositive of the case.

777 S.W.2d at 390-91.

In stating further that "[t]he decision of the court of appeals affirming the judgment is in conflict with *Peralta* and *Lopez*," the Texas Supreme Court clearly recognized that *Peralta* and *Lopez* established the applicable rule of law that was controlling in *LBL Oil*, 777 S.W.2d at 391. The *Peralta* and *Lopez* cases were decided *over one year before* Petitioners filed their Motion for New Trial in this case. Thus, Petitioners' claim that *LBL Oil* established new law is simply wrong.

Because *LBL Oil* merely followed established law, Petitioners' delinquently asserted complaint about lack of notice was not preserved for review by Texas appellate courts. Thus, the court of appeals correctly found that the Non-Bankruptcy Petitioners had waived their constitutional complaints. Pet. App. B at B-11. The Texas Supreme Court, in denying Petitioners' Application for Writ of Error, declined to review the court of appeals' holding. Pet. App. A.

Accordingly, there is no need for this Court to reach the question whether Petitioners appeared in the trial court before the entry of default and were therefore entitled to notice of the default judgment. But if this Court does consider that issue, it should conclude that Petitioners had not appeared in the court below at the time that the default judgment was entered.

D. There Was No Pre-Default Appearance in This Case.

Under *LBL Oil*, a defendant is only entitled to notice of a default judgment hearing if the defendant has appeared in the lawsuit. 777 S.W.2d at 390-91. In the present case, it is undisputed that Petitioners did not file answers before the entry of default. Petitioners claim, however, that because the default judgment recited that Petitioners appeared in the action, Respondents are bound by that recital because Respondents failed to object to the recital and failed to appeal that aspect of the Judgment. Petitioners' Brief at 10. Petitioners claim further that the "record demonstrates that Petitioners did, in fact appear." Petitioners' Brief at 11. Petitioners are wrong on both counts.

1. Petitioner's Waiver Arguments Puts the Cart Before the Horse: It Is Petitioners' Waiver—Not Respondents'—That Is at Issue.

With respect to Petitioners' claim that Respondents waived their contention (or are estopped to contend) that Petitioners did *not* make an appearance because the Judgment recited that Petitioners appeared, it is clear that Petitioners' argument puts the cart before the horse. It is Petitioners who waived their complaint of lack of notice

based on an alleged appearance by failing to complain of the lack of notice in their new trial motion. Had Petitioners complained in their new trial motion that their "appearance" constitutionally entitled them to notice before default, then Respondents would have had an opportunity in the trial court to seek a correction of the erroneous recitation in the Judgment stating that Petitioners appeared. Had Respondents been alerted to the possibility that the language in question might be viewed as more than inconsequential surplusage, Respondents could have, as late as thirty days after the overruling of Petitioners' Motion for New Trial, moved to reform the judgment to delete the inaccurate statement that Petitioners made an appearance. *See Emerson v. Fires Out, Inc.*, 735 S.W.2d 492, 494 (Tex. App.—Austin 1987, no writ). Petitioners are the ones who waived their complaint and are judicially estopped to assert that their purported "appearance" constitutionally entitled them to notice of the motion for default.

2. The Letter Written by Mr. Steinberg Was Not an Appearance.

Petitioners contend that a letter written by Arthur Steinberg, a New York lawyer, to Judge Salazar's clerk in the Harris County District Court constituted an appearance. Petitioners' Brief at 11; Pet. App. N. That letter, however, does not constitute an appearance for a number of reasons. *First,* letters to a court do not, as a general rule, constitute an appearance. *See Pinkston v. Farmers State Bank,* 210 S.W.2d 595 (Tex. Civ. App.—Beaumont 1947, no writ) (telegram to judge not an appearance); *Investors Diversified Services, Inc. v. Brunner,* 366 S.W.2d 810, 815 (Tex. Civ. App.—Houston 1963, writ ref'd n.r.e.) (letter to clerk not an appearance).

Second, in order for Mr. Steinberg's letter to constitute an appearance it must have sought an adjudication by the court. As *Investors Diversified Services, Inc. v. Bruner* held, "[i]n order for an act of the defendant to constitute an appearance . . . it must seek a judgment or an adjudication by the court on the same question." 366 S.W.2d at 815. Although a defendant's act "may have some relation to the cause, it does not constitute a general appearance if it in no way recognizes that the cause is properly pending or that the court has jurisdiction, and no affirmative action is sought from the court." *Id. See also United Nat'l Bank v. Travel Music of San Antonio, Inc.,* 737 S.W.2d 30, 33 (Tex. App.—San Antonio 1987, writ ref'd n.r.e.) (defendant's letter to state court's clerk not an appearance because it sought no adjudication by the court).

As the very cases cited by Petitioners (Petitioners' Brief at 12-13) make clear, in order to constitute an appearance, a defendant's conduct must "in some manner indicate[] his intention to submit his person and cause to the jurisdiction of the court." *Toler v. Travis Cty. Child Welfare Unit,* 520 S.W.2d 834, 836 (Tex. Civ. App.—Austin 1975, writ ref'd n.r.e.). And as *Smith v. Amarillo Hosp. Dist.,* 672 S.W.2d 615, 617 (Tex. App.—Amarillo 1984, no writ) teaches, "the nature and quality of the [defendant's] activities must be examined" to determine whether his conduct constitutes an appearance.

Petitioners, well acquainted with the principles, want this Court to believe that Mr. Steinberg's letter sought an adjudication of this case from the Texas state court. Thus, Petitioners tell this Court that Mr. Steinberg's letter (1) requested that the New York bankruptcy court pleadings, including the answer, be deemed "the duly filed

pleadings" of the parties in the Texas state court; (2) requested "that there be a prompt adjudication of the underlying claims asserted by the parties hereto;" and (3) requested to be advised "of the approaches it deemed advisable 'in order to achieve . . . the foregoing action.'" Petitioners' Brief at 11. Petitioners totally misconstrue Mr. Steinberg's letter.

Mr. Steinberg's letter did not ask the Texas state court to deem the New York bankruptcy pleadings "duly filed" in the Texas state court in order to seek an adjudication from the Texas court. Rather, Mr. Steinberg asked the Texas state court, in the event the New York Bankruptcy court determined not to transfer the case to the New York federal court, to deem the letter "a request for the removal of the Texas Action to the federal district court and that all pleadings filed in the New York Proceeding, including the Answer, be deemed the duly filed pleadings of the parties in the Texas Action." Pet. App. N at N-3. Thus, it is clear that Mr. Steinberg requested Judge Salazar's clerk to deem the New York bankruptcy pleadings "duly filed" in the Texas state court solely to affect a removal of the cause to a Texas federal court if Petitioners were unable to get the New York bankruptcy action transferred to a New York federal court.[3]

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3. Moreover, an improper removal does not constitute an appearance. *Employers Reinsurance Corp. v. Bryant,* 299 U.S. 374, 376 (1937) ("[o]btaining the removal from the state court into the federal court did not operate as a general appearance by the defendant"); *Enserch Int'l Exploration, Inc. v. Attock Oil Co.,* 656 F. Supp. 1162, 1167 n.16 (N.D. Tex. 1987) (removal does not constitute a general appearance); *Curry v. Dell Publishing Co.,* 438 S.W.2d 887, 890 (Tex. Civ. App.—El Paso 1969, writ ref'd n.r.e.), *overruled on other grounds, Kawasaki Steel Corp. v. Middleton,* 699 S.W.2d 199, 202 (Tex. 1985) ("there was no appearance of defendant in State Court because, upon the filing of the Petition for Removal with accompanying bond, the State Court was divested of jurisdiction").

Furthermore, Mr. Steinberg's letter did not ask the Texas state court promptly to adjudicate the underlying merits of the case. Instead, Mr. Steinberg used the language referring to "a prompt adjudication of the underlying claims asserted by the parties" merely to express his "hope" that Judge Salazar and Respondents would "recognize" that "[s]ignificant judicial economics can be achieved by continuing the New York Proceeding in the Federal District Court of New York." *Id.* Thus, Mr. Steinberg wanted both Respondents and Judge Salazar to "recognize" that only by continuing the New York state action in a New York federal court could there "be a prompt adjudication of the underlying claims of the parties hereto." *Id.*

Finally, Mr. Steinberg did not ask the Texas state court to inform him of approaches the court thought advisable as a method of seeking an adjudication in the Texas state court. Rather, his letter merely asked the Texas court to inform him if a "different approach be deemed more advisable" to achieve "*any* of the foregoing actions." *Id.* (emphasis added). By leaving out the "any" in the quoted language, Petitioners attempt to persuade this Court that Mr. Steinberg's game plan was to get the New York bankruptcy pleadings filed in the Texas court in order promptly to adjudicate the parties' claims in the Texas court. The truth is, however, that the entire thrust of Mr. Steinberg's letter was *to avoid* having to try this case in a Texas state court; i.e., Mr. Steinberg wrote Judge Salazar's clerk to apprise the Texas court of Petitioners' intention to have the New York bankruptcy proceedings removed to a New York federal court or, alternatively, to have the Texas proceedings removed to a Texas federal court. *Id.*

3. Neither Mr. Steinberg's Letter Nor His Participation by Telephone in a Later Motion Hearing Was an Appearance Because Mr. Steinberg Is Not Authorized to Practice Law in Texas.

Mr. Steinberg is not authorized to practice law in Texas. A copy of the certification from the Texas Supreme Court stating that he is not authorized to practice law in Texas is attached to this brief as App. G. Nor is he an officer or employee of any of the Petitioners' Corporations. Therefore, he could not enter an appearance by his letter because an appearance not made in open court must be made by the party itself or by an "attorney of the court." TEX. R. CIV. P. 7.[4] Since Mr. Seinberg's letter was not written by a party or an attorney of the court, it could not have constituted an appearance. *See Gonzales v. Gutierrez*, 694 S.W.2d 384, 389 (Tex. App.—San Antonio 1985, no writ) (appearance by city attorney on behalf of airport director in his official capacity on behalf of mayor in his official capacity was not an appearance by the city and did not bind city; moreover, at no time did city attorney indicate that city was making an appearance). Similarly, Mr. Steinberg's telephone call to Judge Hughes, sitting not in the Texas state court but in a Texas federal court, did not constitute an appearance in the Texas court because Mr. Steinberg is not licensed to practice law in Texas.

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4. Under TEX. R. CIV. P. 120, an appearance may be made "in open court" by an authorized agent of a party. The letter in question clearly does not constitute an appearance in open court. Therefore, Rule 120 is inapplicable.

4. Neither Petitioners' Participation in Motion Hearings Nor Their Filing of Responses to Respondents' Motions Constituted an Appearance.

Petitioners argue that they appeared in this action by participating in motion hearings in federal court and through the filing of responses to Respondents' motions. Petitioners' Brief at 11-12. They point out that on June 29, 1988, Mr. Steinberg participated by telephone in an in-chambers conference conducted by federal Judge Hughes in connection with Respondents' remand motion, and further point out that Texas attorney Michael Caddell attended the oral hearing held by federal Judge Hughes in connection with Respondents' motion for sanctions, emphasizing that Mr. Caddell filed a written response to that motion in a federal court. *Id.*

a. Mr. Steinberg's Telephone Conference with Judge Hughes in the Show Cause Hearing Was Not an Appearance.

Mr. Steinberg's participation by telephone in the show cause hearing on Respondents' motion for contempt before Judge Hughes in a Texas federal court was not an appearance in the Texas state court lawsuit. Even if actions taken in federal court proceedings could be deemed actions taken in state court proceedings—which they cannot—Texas law is clear that an appearance in response to a motion "is an appearance to the motion only and is not a general appearance subjecting defendant to the court's jurisdiction generally." *Green v. Green,* 424 S.W.2d 479, 481 (Tex. Civ. App.—Tyler 1968, no writ). *See also Turner v. Turner,* 576 S.W.2d 452, 454 (Tex. Civ. App.—Houston [1st Dist.] 1978, no writ); *Gibson*

v. State, 288 S.W.2d 577, 578 (Tex. Civ. App.—Waco 1956, writ dism'd). Furthermore, Mr. Steinberg's participation in the show cause hearing did not constitute an appearance in the main suit because an appearance, "required by the terms of [a] show cause order, to contest an interlocutory motion is an appearance to the motion only and is not a general appearance subjecting [the Respondent] to the court's jurisdiction generally." *Green,* 424 S.W.2d at 481. *See also Turner,* 576 S.W.2d at 454; *Gibson,* 282 S.W.2d at 578.

b. Mr. Caddell's Presence at the Show Cause Hearing Before Judge Hughes Was Not an Appearance.

For the same reasons that Mr. Steinberg's telephone call to Judge Hughes did not constitute an appearance, Mr. Caddell's signed response to Respondents' Order to Show Cause and his appearance at Judge Hughes' hearing in federal court on that matter did not constitute an appearance in the Texas state court action.

5. Mr. Caddell's Informal Communications with Judge Salazar About a Texas State Court Hearing Was Not an Appearance.

Petitioners imply that Mr. Caddell's comment to federal Judge Hughes "that he [Mr. Caddell] had previously spoken to Judge Salazar about a hearing in state court," constituted an appearance. Petitioners' Brief at 12. Petitioners' contention that a casual chat that Mr. Caddell had with Judge Salazar concerning a hearing in the Texas state court action constituted an appearance in that action is ludicrous. Texas law is clear that informal approaches to a trial court are not formal appearances. *See Perez*

Bustillo v. State, 718 S.W.2d 344, 848 (Tex. App.—Corpus Christi 1986, no writ) (defendants' informal approach to trial court did not constitute an appearance).

CONCLUSION

Petitioners failed to preserve their complaint that lack of notice of the hearing on the default judgment violated their Fourteenth Amendment right to due process as enunciated in *Peralta,* 485 U.S. at 99 and in *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306 (1950). For that reason alone the petition for writ of certiorari should be denied. The petition should also be denied because Petitioners, having failed to answer or to appear in any other way in the Texas state court action, were not entitled to notice of the hearing on the default judgment; hence, Petitioners' constitutional right to due process was not violated.

Respectfully submitted,

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May 23, 1991

APPENDIX A

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NEW YORK

Chapter 11

Case No. 187-70557-353

In Re: HBA EAST, INC.,
ROUND ONE PRODUCTIONS, INC.,
JEFFREY D. LEVINE,
Debtors.

DECISION AND ORDER ON MOTION TO DISMISS CHAPTER 11 CASES

JEROME FELLER
United States Brankruptcy Judge

APPEARANCES:

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PLAINTIFF'S EXHIBIT 10

* * *

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* * *

. . . conglomerate of factors rather than on any single datum."

These guidelines, insofar as here applicable, require consideration of the following: i) whether the Debtors filed their Chapter 11 petitions as a tactic to obtain a litigation advantage, ii) whether the Debtors' reorganization effort is essentially a two party dispute, iii) the nature and extent of the Debtors' assets, debts and business operations and iv) whether there is a reasonable probability that a reorganization plan can be proposed and confirmed.

The filing of the Debtors' Chapter 11 petitions on March 27, 1987 was strategically timed and calibrated to events in Texas. A period of approximately three months had elapsed since the complete breakdown of the Abercrombie-Levine business relationship and concomitant termination of funding the Debtors' operations. Movants had taken concrete steps to cure or mitigate their alleged hurt arising out of that relationship, the most significant of which was commencement of the Texas Action on March 3, 1987. By filing on the eve of their answering date in the Texas Action and not before, the Debtors were able to use the automatic stay as a sword to avoid appearing in that lawsuit, and were able to shift the forum of their disputes with Movants to this Court, a forum they believed might be more favorable to their plight.[27] As a general rule where, as here, the timing of the filing of a Chapter 11 petition is such that there can be no doubt that the primary, if not sole, purpose of the filing was a litigation tactic, the petition may be dismissed as not being filed in good faith. *Furness v. Lilienfield, supra; In re Karum* . . .

* * *

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* * *

. . . to "reorganize" the disagreements with Movants. There are hardly any other creditors apart from Movants and there is no evidence that even such other creditors are clamoring for payment. The Debtors' one man business operation is highly speculative and the assets are disputed. There is virtually no money to run the business, no cognizable assets to fund a plan of reorganization and no realistic probability of a successful reorganization. Where, as here, the totality of facts and circumstances rise to a level of egregiousness compelling a conclusion that the reorganization process is being perverted, we are constrained to dismiss the Chapter 11 petitions as not being filed and maintained in good faith.

The Debtors further argue that they properly filed their Chapter 11 petitions to obtain the much needed protection of a breathing spell provided by the automatic stay contained in 11 U.S.C. § 362(a) as against Movants. This argument is fallacious. The protection of the automatic stay is not *per se* a valid justification for a Chapter 11 filing; rather, it is a consequential benefit of an otherwise good faith filing. A perceived need for the automatic stay, without more, cannot convert a bad faith filing to a good faith one. *In re Herndon Executive Center, Inc.*, 36 B.R. 803, 806 (Bankr. M.D. Fla. 1984). Similarly, it has been held that Chapter 11 petitions filed merely to take advantage of other singular provisions of the Bankruptcy Code are improper and may be dismissed as not . . .

* * *

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* * *

ORDER

Based on all the foregoing, it is ORDERED, ADJUDGED AND DECREED that the motion to dismiss the above-captioned Chapter 11 cases filed by JEA Boxing Company, Inc. and Pine Hill Investments, Inc. d/b/a Houston Boxing Association be, and hereby is, granted; and it is further

ORERED, ADJUDGED AND DECREED that the Chapter 11 cases of HBA East, Inc., Round One Productions, Inc. and Jeffrey D. Levine be, and the same hereby are, dismissed.

Dated: Brooklyn, New York

June 3, 1988

By: /s/ JEROME FELLER

Jerome Feller

United States Bankruptcy Judge

APPENDIX B

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

ROUND ONE PRODUCTION, INC.,
and HBA EAST, INC.,
Plaintiffs,

against

JOSEPHINE ABERCROMBIE, HOUSTON BOXING ASSOCIATION, INC., HBA, INC., STANLEY HOFFMAN, and RONALD KATZ,
Defendants.

Index No. IAS Part 11915

NOTICE OF MOTION

PLEASE TAKE NOTICE, that upon the affirmation of Brian M. Cogan, dated July 14, 1988, and the exihibts annexed thereto, defendants will move this Court, before an IAS Part thereof, to be held at the Supreme Court Building, Mineola, New York, on the 27th day of July, 1988, at 9:30 a.m., or as soon thereafter as counsel may be heard, for an Order: (1) pursuant to CPLR 3211 (a)(4), dismissing this action, on the ground that a prior action is and has been pending between these parties in the Texas State Courts since March 3, 1987; (2) pursurant to CPLR 3211(a)(7), dismissing the complaint for failure to state a cause of action; and (3) for such other and further relief as the Court deems proper.

PLEASE TAKE FURTHER NOTICE, that any answering papers shall be served so as to be received by the undersigned no later than seven (7) days before the return date of the motion.

Dated: Mineola, New York
July 15, 1988

MEYER, SUOZZI, ENGLISH
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TO: MICHAEL M. PERLMAN, ESQ.
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

ROUND ONE PRODUCTION, INC.,
and HBA EAST, INC.,
Plaintiffs,

against

JOSEPHINE ABERCROMBIE, HOUSTON BOXING ASSOCIATION, INC., HBA, INC., STANLEY HOFFMAN, and RONALD KATZ,
Defendants.

Index No. IAS Part_____

AFFIRMATION

BRIAN M. COGAN, an attorney admitted to practice before the Courts of this State, affirms the following to be true, under penalties of perjury:

1. I am a member of the firm of Stroock & Stroock & Lavan, which along with the firm of Meyer, Suozzi, English and Klein, is co-counsel for defendants. I make this affirmation in support of defendants' motion to dismiss this action: (1) pursuant to CPLR 3211(a)(4) on the ground that there is and has been a prior action pending between these same parties over the same dispute in the Texas State Courts (the "Texas Action") since March 3, 1987; and (2) pursuant ot CPLR 3211(a)(7) for failure to state a cause of action. As will be shown below, this case represents the plaintiffs' fourth attempt to shift the forum for this dispute out of the Texas State Court and to some other court. Every other court that has considered the plaintiffs' efforts has rejected those attempts; we respectfully submit that this Court should do the same.

BACKGROUND

2. The facts relevant to this case are fully set forth in the Decision of the Hon. Jerome Feller of the United States Bankruptcy Court for the Eastern District of New York, entered on June 3, 1988 (the "Bankruptcy Decision"), in bankruptcy cases entitled *in re HBA East, Inc., Round One Productions, Inc. and Jeffrey D. Levine,* a copy of which is included as Exhibit 1 in the documentary supplement ("Doc. Supp.") submitted herewith. As will be explained below, these were voluntary Chapter 11 bankruptcy cases filed by the plaintiffs herein in an attempt to avoid having this dispute determined in the Texas State Courts. Judge Feller rejected the plaintiffs' strategy, finding they had undertaken it in bad faith, and in so doing, made extensive findings of facts and conclusions of law concerning the dispute between these parties.

3. To summarize Judge Feller's Decision, this dispute arises from the hostile dissolution of the business relationship between the parties. The defendants consist of Josephine E. Abercrombie, a Texas resident, and Houston Boxing Association, Inc., also known as HBA, Inc., a Texas corporation of which Josephine Abercrombie is the sole shareholder.[1] The other individual defendants, Stanley Hoffman and Ronald Katz, are employees of HBA, Inc. The plaintiffs consist of HBA East, Inc. and Round One

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1. As shown below, two affiliated Abercrombie Texas corporations, JEA Boxing Company, Inc. ("JEA Boxing") and Pine Hill Investments, Inc. d/b/a Houston Boxing Association, acted together in their partnership with the plaintiff corporations herein. In order to facilitate cross-references between the Bankruptcy Court proceedings, the Texas State Court proceedings, and the instant case, Mrs. Abercrombie, Pine Hill, and JEA Boxing will be referred to as "JEA" throughout this motion.

Productions, Inc., two shell corporations of which Jeffrey D. Levine is the sole shareholder and officer.[2] (Bankruptcy Decision at 3).

4. Levine approached Abercrombie in or about October, 1984, and initiated discussions about a partnership in the boxing promotion business. (Bankruptcy Decision at 5). Prior to his meeting Abercrombie, Levine's forays into the boxing business had failed, and his business, conducted through other shell corporations, was "tottering on the brink of financial collapse." *Id.* Through various representations, Levine persuaded Abercrombie, through JEA and Pine Hill, to finance a partnership between them, and JEA and Pine Hill eventually funnelled $1.2 million to Levine. *Id.* at 5-7. The agreement was that JEA would supply the funding for the partnership, and Levine would do the day-to-day activities of the partnership in New York and New Jersey.

5. Levine left it to JEA to determine the legal form of their business relationship. *Id.* at 6. The parties thereafter executed a Limited Partnership Agreement—containing an express Texas choice-of-law clause (¶ 16.02 thereof)— which confirmed and ratified the arrangement that they had agreed to more than one year earlier.[3] Levine formed the plaintiff "HBA East, Inc.", taking the name from Abercrombie's pre-existing business in Texas (*i.e.*, Houston Boxing Association) in order to capitalize

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2. Since Judge Feller found that Levine's corporations are virtual shells and Levine's alter egos, the plaintiffs will be referred to herein as "Levine."

3. A copy of the limited partnership agreement is annexed to JEA's complaint in the Texas State Court (known as a "petition" under Texas practice) as Exhibit A thereto. JEA's Texas complaint is included in the documentary supplement as Exhibit 2, and is referred to herein as the "Texas Complaint".

on the reputation that Houston Boxing Association had already acquired in the industry. Under the terms of the Limited Partnership Agreement and its amended version,[4] HBA East, Inc., became the managing general partner of the limited partnership, which was called "HBA East, Ltd." One of Abercrombie's corporations, Pine Hill, was a limited partner, and another Abercrombie corporation, JEA Boxing, was a general partner. *Id.* at 6-7. However, § 7.05 of the amended limited partnership agreement further provided that if Levine or his entities breached the agreement, then

> [JEA] shall have the right, exercisable by written notice . . . to convert the interest of the Managing Partner [HBA East, Inc.] in the Partnership from a general partner interest to a limited partner interest in the Partnership. Such conversion shall . . . preclude the Managing Partner from any further control in the management and control of the Partnership.

Doc. Supp. Exhibit 3, Exhibit B thereto at 16.

6. Despite over $1.2 million supplied by JEA to Levine and hundreds of thousands of dollars more which Levine had taken into the business, Levine always operated the venture at a loss. Bankruptcy Decision at 12. More importantly, although he was using the money to pay his personal expenses, he refused repeated requests to account for any of the moneys provided by JEA. The partnership collapsed in early 1987 when JEA learned that, instead of obtaining promotion contracts in the name of the limited partnership (HBA East, Ltd.), Levine

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4. A copy of the amended limited partnership agreement is annexed to JEA's complaint in the "adversary proceedings" (*see infra* ¶ 11) as Exhibit B thereto. JEA's complaint in the adversary proceeding is included in the documentary supplement as Exhibit 3.

had put all the contracts except one—the Carl Williams contract—in the name of his own corporation, HBA East, Inc. The Carl Williams contract was put in Levine's other corporation, Round One Production. Levine had thus used JEA's funds to usurp for himself what were to have been partnership opportunities. Texas Complaint at 6-9.

7. JEA thereupon terminated all further funding. Bankruptcy Decision at 8. It also invoked § 7.05 of the amended limited partnership agreement, thereby converting Levine's interest in the limited partnership to that of a limited, non-participatory partner, and began dissolution and winding up of the partnership. *Id.*

8. On March 3, 1987, with Levine having still failed to account for the disappearance of the $1.2 million and the substantial additional funds he had received, and having failed to explain why the contracts had been placed in the name of HBA East, Inc. or Round One instead of the limited partnership, JEA commenced litigation against Levine and his entities in Texas State Court. *See* Doc. Supp. Exhibit 2. Levine was sued for, *inter alia*, breach of contract, breach of fiduciary duty, usurpation of partnership opportunities, and fraud, and a constructive trust and receiver were sought to assert control over the boxing contracts which Levine had wrongfully placed in the name of his own corporations, and whatever portion of the funds he had not dissipated.

LEVINE'S FIRST ATTEMPT TO AVOID TEXAS

9. On March 27, 1987—just days before he was required to answer the complaint in Texas—Levine and his entities filed for bankruptcy under Chapter 11 of the United States Bankruptcy Code in the United States Bank-

ruptcy Court for the Eastern District of New York. Chapter 11 is not a liquidation statute, but a reorganization statute, whereby a debtor is left in full control of his business so that, in theory, he can pay off his debts by continuing the business. Levine contended in his petition that he had filed bankruptcy because of a need to "reorganize" his business by avoiding the Texas Action. Bankruptcy Decision at 20, 29.

10. As Levine had fully intended, the filing of the bankruptcy petitions brought an immediate halt to the Texas Action. This is because 11 U.S.C. § 362, the "automatic stay" provision of the federal Bankruptcy Code, operates as an injunction against all creditors from continuing any lawsuit against the Chapter 11 debtor. Under this federal law, any proceedings which JEA continued against Levine outside of Bankruptcy Court would not only have been null and void, but contemptuous. *Id.* at 3.

11. Faced with the automatic stay of the Texas Action, JEA took several actions to try to assert its rights against Levine, find out what he had done with the $1.2 million and the substantial additional funds he had received, and obtain possession of the boxing contracts that had wrongfully been put in the name of HBA East, Inc. or Round One. First, JEA commenced what is known as an "adversary proceeding" in the Bankruptcy Court. This is a lawsuit within the Chapter 11 bankruptcy case, and the usual federal rules for discovery, motion practice, and trial apply. (A copy of the complaint in the adversary proceeding, which is substantially the same as the Complaint in the Texas Action, is included in the documentary supplement as Exhibit 3). Levine and his entities served an Answer and Counterclaims in the adversary proceeding (a copy of which is included in the documentary

supplement as Exhibit 4), asserting essentially the same claims of "interference" which they assert in the instant case.

12. Second, shortly after commencing the adversary proceeding, JEA filed a motion to dismiss the entire bankruptcy cases on the ground that since Levine had no business to reorganize, the bankruptcy petitions were filed in bad faith; Levine was merely trying to avoid answering the complaint in the Texas Action and thereby shift the forum of that action from Texas to New York. Bankruptcy Decision at 9.

13. Third, Abercrombie formed another Texas corporation, Houston Boxing Association, Inc., for the purpose of having, as she sought from Levine, a New York presence in the boxing business, and hired the defendants Hoffman and Katz to conduct that business in New York. *Id.* at 6.

14. When he received the motion to dismiss, Judge Feller ordered a stay of the adversary proceeding, reasoning that there would be no point in hearing the lawsuit if he was going to dismiss the entire Chapter 11 case. After hearing all of the evidence, on June 3, 1988, Judge Feller entered his Decision and Order on Motion to Dismiss Chapter 11 Cases (Doc. Supp. Exhibit 1). Finding that Levine had acted in bad faith in filing for bankruptcy, he dismissed the cases outright:

> In essence, these Chapter 11 cases involve little more than a private two-party dispute.
>
> * * *
>
> The filing of the Debtors' Chapter 11 petitions on March 27, 1987 was strategically timed and calibrated to events in Texas. . . . By filing on the eve

> of their answering date in the Texas Action and not before, the Debtors were able to use the automatic stay as a sword to avoid appearing in that lawsuit, and were able to shift the forum of their disputes with Movants to this Court, a forum they believed might be more favorable to their plight. As a general rule where, as here, the timing of a filing of a Chapter 11 petition is such that there can be no doubt that the primary, if not sole, purpose of the filing was a litigation tactic, the petition may be dismissed as not being filed in good faith.
>
> * * *
>
> Where, as here, the totality of the circumstances rise to a level of egregiousness compelling a conclusion that the reorganization process is being perverted, we are constrained to dismiss the Chapter 11 petitions as not being filed and maintained in good faith.

Bankruptcy Decision at 22, 24, 29 (footnote omitted). Thus, Levine's initial attempt to avoid the Texas action was decisively rejected.[5]

LEVINE'S OTHER ATTEMPTS TO AVOID TEXAS

15. Despite the condemnation of Levine's tactics by Judge Feller, Levine remained intent on avoiding the Texas Action at all costs. On June 17, 1988, Levine made a motion to Judge Feller, asking him to transfer the adversary proceeding to the United States District Court for the Eastern District of New York as part of his Order

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5. Upon Judge Feller's dismissal of the bankruptcy cases, JEA filed an amended complaint in the state court action. The amended complaint, a copy of which is included in the documentary supplement as Exhibit 5, is essentially the same as the original complaint, except it incorporates the events that transpired in the bankruptcy cases.

dismissing the Chapter 11 cases. Judge Feller wasted no time with this frivolous request; six days later, upon hearing oral argument, Judge Feller orally denied the motion in terms equally clear to his initial decision dismissing the cases:

> [T]his Court is unaware of any authority for the proposition that this Bankruptcy Court, which is an inferior, subordinate unit of the United States District Court for the Eastern District of New York, has the power to transfer the litigation to the District Court. . . .
>
> Now, the former debtors here claim or assert and argue fairness, administrative convenience, [and] convenience of the parties to persuade this Court that the . . . case should be transferred to the District Court, assuming, such a transfer can be effectuated by this Court. . . .
>
> [B]ut the debtors seem to forget that these Chapter 11 cases were found to be a misuse and abuse of the bankruptcy reorganization process and were required to be dismissed as not being filed in good faith. . . .

Transcript of Proceedings dated June 23, 1988 at 17, 18, 20 (relevant portions appear in the documentary supplement as Exhibit 6).

16. Levine became yet more desperate, and his legal maneuvering more absurd. On June 29, 1988, six days after being again reprimanded by Judge Feller, Levine filed a Petition for Removal of the Texas Action to the United States District Court for the Southern District of Texas. The very next day, Judge Lynn N. Hughes of that court remanded the case to Texas State Court, finding that the case was not removable and that Levine had

again attempted to forum shop in bad faith.[6] (A copy of the Order of Remand appears in the documentary supplement as Exhibit 7).

THE INSTANT CASE INVOLVES SUBSTANTIALLY THE SAME PARTIES AND ISSUES AS THE TEXAS ACTION

17. On June 30, 1988—one day after having been rejected by Judge Hughes—Levine commenced the instant action.[7] (A copy of the Summons and Complaint appears in the documentary supplement as Exhibit 9). Levine has clearly commenced this action for the purpose of pre-empting the previously obtained jurisdiction of the Texas State Court. However, Levine's latest attempt to avoid the Texas Action can fare no better than his earlier efforts. CPLR 3211(a)(4) provides that, under

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6. During the pendency of the bankruptcy cases, Judge Feller had ordered Levine to create an escrow fund, which he could not invade, in order to protect JEA in the event the bankruptcy cases were dismissed. When Levine improperly attempted to remove the Texas state court action to Texas federal court, federal Judge Hughes ordered Levine to transfer the fund to the Clerk of the Court in Texas to await disposition of the litigation there. Levine refused, and in another demonstration of his willingness to abuse the judicial system, ordered his attorneys to commence an interpleader action in the United States District Court for the Southern District of New York. Only after Judge Hughes threatened to hold Levine and his attorneys in contempt when they failed to comply with his order did Levine and his attorneys transfer the escrow fund to Texas, where it currently remains. (A copy of the transcript of proceedings before Judge Hughes appears in the documentary supplement as Exhibit 8).

7. Although Levine's complaint in this case was served (improperly) on June 30, 1988, the summons is dated June 29, 1988—the same day on which Levine's lawyers were arguing unsuccessfully before Judge Hughes that he should keep the case in Texas federal court.

these circumstances, the Supreme Court should dismiss this action on the ground that a prior similar action is pending.

18. The claims raised by Levine herein are the same claims he raised as counterclaims in the adversary proceeding, and the claims that JEA will raise as counterclaims herein are the same as are already pending in Texas. The parties' claims are opposite sides of the same coin.

19. Specifically, the crux of Levine's complaint in the instant case is the same as his claims in the bankruptcy adversary proceeding—that JEA has "interfered" with contracts that belong to HBA East, Inc. and Round One Productions, Inc. However, Levine and his corporations have already been sued in Texas over one year ago for, *inter alia,* a determination that those contracts do not even belong to HBA East, inc., but to JEA and Pine Hill, as the sole general partners under the limited partnership agreement which Levine and his entities breached. Obviously, the issue of whether Levine can state a cause of action for tortious interference with contract is entirely dependent upon whether he or his corporations have any rights with regard to those contracts—issues upon which JEA has sued over one year ago.

20. If JEA is compelled to answer Levine's latest complaint, the claims raised in JEA's complaint now pending in Texas will necessarily be raised as counterclaims. As in the pending Texas Action, JEA will counterclaim that HBA East, Inc., as managing partner of HBA East, Ltd., was restricted from engaging in any business activity in competition with the business activities of the partnership and from diverting to himself partnership

opportunities, and that, consequently, all of the business transactions that Levine entered into in the field of boxing promotions were for the benefit and belong solely to the limited partnership. Similarly, JEA will defend against Levine's claims here by showing that it could not be liable for intereference with contracts which JEA, and not Levine, had the contractual right to control. This is the same showing JEA will make to support its claims in Texas. In fact, all of the issues raised by both sides—*e.g.*, who breached the relationship, was the limited partnership agreement valid, did either side usurp business opportunities that belonged to the other or to the joint venture, and Levine's use of partnership funds—arise out of the hostile dissolution of their business relationship, and are or will be necessarily raised in both the Texas Action and the instant action. Moreover, the evidence before Judge Feller was undisputed that the docket of the Texas State Court will permit this action to be tried in less than six months.

21. The law is clear that the legal and factual issues surrounding the dissolution of the parties' relationship should not be simultaneously determined in two forums. As shown in the accompanying memorandum of law, CPLR 3211(a)(4) provides that a second-filed action may be dismissed in order to avoid forum shopping and duplicative litigation. The New York courts have been steadfast in refusing to permit duplicative litigation and in relegating parties to the forum where the action was first commenced.

22. I respectfully submit that there is absolutely no basis for permitting Levine to engage in duplicative litigation or to avoid the forum where this dispute was first filed. Under well-established law this Court should dis-

miss the instant action on the ground that a prior action is pending, and for failure to state a cause of action.

Dated: New York, New York
July 14, 1988

By: /s/ BRIAN M. COGAN
Brian M. Cogan

AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK)
)ss.:
COUNTY OF NASSAU)

Todd Goodman, being duly sworn deposes and says, that deponent is not a party to the within action, is over 18 years of age and resides at Long Beach, New York, Nassau County.

On the 15th day of July, 1988, deponent served a copy of the Notice of Motion with affirmation upon:

Michael M. Perlman, Esq.
Attorney for Plaintiffs
585 Stewart Avenue
Garden City, New York 11530

By delivering a true copy thereof to him personally.

/s/ TODD GOODMAN
Todd Goodman

Sworn to before me this
15th day of July, 1988.
/s/ JANICE ENRIGHT
Notary Public

COUNTY CLERK'S OFFICE, §
STATE OF NEW YORK §ss.:
COUNTY OF NASSAU §

I, Harold W. McConnel, Clerk of the County of Nassau and of the Supreme and County Courts, Courts of Record, do hereby certify that I have compared the annexed with the original Notice of Motion filed in my office 12-20-88 and that the same is a true transcript thereof, and of the whole of such original.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said County and Court May 2, 1989.

/s/ Harold W. McConnell, Clerk

MEMORANDUM DECISION

SUPREME COURT, NASSAU COUNTY, IAS PART 18

BY: BRUCIA, JAMES J.

DATE: November 4, 1988
INDEX NO. 11915/88

ROUND ONE PRODUCTION, INC.,
and HBA EAST, INC.,
Plaintiffs,

- against -

JOSEPHINE ABERCROMBIE, HOUSTON BOXING ASSOCIATION, INC., HBA, INC., STANLEY HOFFMAN, and RONALD KATZ,
Defendants.

MICHAEL M. PERLMAN, ESQ.
Attorney for Plaintiff
585 Stewart Avenue
Garden City, New York 11530

STROOCK, STROOCK & LAVAN, ESQS.
Atty. for Defendants
7 Hanover Square
New York, N.Y. 10004-2594

MEYER, SUOZZI, ENGLISH & KLEIN, P.C.
Atty. for Defendants
1505 Kellum Place
Mineola, New York 11501

This motion by defendants for an order pursuant to CPLR 3211(a)(4) and (7) dismissing the within action is granted in accordance herewith.

I.

Defendants move pursuant to CPLR 3211(a)(4) seeking to dismiss the action in this Court by reason of a prior pending Texas Court action. In essence, the Texas action involves a proceeding by Pine Hill Investments, Inc., a limited partner of a Texas Limited Partnership, known as HBA East, Ltd., against 1) its general managing partner, HBA East, Inc. of Garden City, New York (a New York plaintiff), for an accounting and appointment of a receiver and 2) against Levine and his corporations (including both New York plaintiffs) to recover damages and lost profits by reason of contract breaches, fraud and self dealing. The complaint in this New York Court action seeks damages for 1) wrongful interference with a contract between Round One Production, Inc. and Carl Williams and (2) wrongful interference with a contract between HBA East, Inc. and Vincent Bergese, Tony Martin, Tony Tucker and (3) other unlawful interference with further contractual relationships or business opportunities involving the use of their professional services.

It is conceded that one of the claims in the Texas Court action alleges that the Texas Limited Partnership is entitled to those fighter promotion contracts and business opportunities which form the basis of the New York actions (see affirmation of counsel for plaintiffs dated August 3, 1988, p. 6). Likewise, it is uncontroverted that the New York plaintiffs are named defendants in the Texas action and the New York defendants are closely

affiliated with the Texas plaintiffs (New York defendant Abercrombie is apparently a principal of the Texas plaintiffs as well as sole shareholder of the corporate New York defendant, which, in turn employs the two remaining New York defendants). Thus, while there may not be complete identity of the parties and causes of action in the two actions, there is substantial identity sufficient to satisfy the requirements of CPLR 3211(a)(4) (see *Karen-Di Resta Construction Co., Inc. v. Albert B. Ashforth, Inc.*, 100 AD2d 760). While the court has considered staying the New York action pending resolution of the Texas action, since the Texas action will no doubt have collateral estoppel and/or res judicata effect on the New York action (see 4 Weinstein-Korn-Miller, New York Civil Practice, ¶ 3211.24, p. 32-84), in the interest of judicial economy an outright dismissal appears warranted conditioned upon a waiver by the New York defendants of any jurisdictional objections or statute of limitations objections to being added to the Texas action (Ibid. at pp. 32-85 to 32-87). If they be so advised, the New York plaintiffs shall act within ninety (90) days of service upon them of a copy of the order to be settled herein to add the New York defendants to the Texas action through the assertion of any appropriate counterclaims and/or third party claims.

II.

Were this court not dismissing plaintiffs' complaint pursuant to CPLR 3211(a)(4), dismissal would in any event be warranted pursuant to CPLR 3211(a)(7) (although leave to re-plead would be warranted).

The first cause of action seeks damages for wrongfully interfering with the contract between plaintiff, Round One

Productions, Inc. and Carl Williams. The second cause of action seeks damages for wrongfully interfering with contracts between plaintiff HBA East, Inc. and Vincent Burgese, Tony Martin and Tony Tucker. Neither cause of action alleges that the existing contract was breached as a result of defendants' wrongful conduct. (See: 4E NY Cons. Laws Serv. Anno., Subd 55, Forms 1248-1253 at pp. 368-373). Such is a material element of the cause of action for tortious interference with a contract. (See: *Israel v. Wood Dolson Co.,* 1 NY2d 116; *Kaminski v. United Parcel Service,* 120 AD2d 409; *Key Bank v. Lake Placid,* 103 AD2d 19) which must be alleged in specific nonconclusory terms (cf. *Turner Constr. v. Seaboard,* 93 AD2d 88; *Susskind v. Ipco Hospital Supply Corporation,* 49 AD2d 915). The complaint is required "to recite in nonconclusory language facts establishing all the elements of a wrongful and intentional interference with plaintiff's contractual rights". (*Benton v. Kennedy-Von Saun Mfg. Corp.,* 2 AD2d 27, 30).

In addition, each of the causes of the complaint fail to state facts of tortious interference with prospective contractual relations in that the complaint does not allege that *but for* the alleged interference the prospective relationship would have been realized. (See: *Union Car Advertising Co. v. Collier,* 263 N.Y. 398; *Mandelblatt v. Devon Stores,* 132 AD2d 162). While the complaint alleges negotiations, it fails to allege that the negotiations failed but for defendants alleged interference. Thus, no cause of action based upon interference with prospective contractual relations has been set forth. (See: *Susskind v. Ipco Hospital Supply Corporation,* supra; cf. *Williamson, Picket, Gross, Inc. v. 400 Park Avenue Company,* 63 AD2d 880; *Vendall, Inc. v. Statler Manufacturirng Corp.,* 5 AD2d 882, 883).

Settle order on twenty (20) days notice providing for outright dismissal of the within action if the proposed order includes the waiver by the New York defendants referred to infra. Said waiver by the New York defendants shall be annexed to the proposed order to be settled herein. In the event the New York defendants elect not to waive, then the order shall provide for dismissal with leave to replead within twenty (20) after service of a copy of said order on counsel for plaintiffs after which the within action shall be stayed pending determination of the Texas action. Plaintiffs may precipitate an election by the New York defendants by settling their own judgment on notice providing for the dismissal with leave to replead referred to above.

By: /s/ JAMES J. BRUCIA
J.S.C.

Dated: November 4, 1988
Chamber's Date: 11-4-88

COUNTY CLERK'S OFFICE, §
STATE OF NEW YORK § ss.:
COUNTY OF NASSAU §

I, Harold W. McConnell, Clerk of the County of Nassau and of the Supreme and County Courts, Court of Record, do hereby certify that I have compared the annexed with the original Memorandum Decision filed in my office Dec. 20, 1988 and that the same is a true transcript thereof, and of the whole of such original.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said County and Court May 2, 1989.

/s/ Harold W. McConnell, Clerk

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

ROUND ONE PRODUCTION, INC., and
HBA EAST, INC.,
Plaintiffs,

- against -

JOSEPHINE ABERCROMBIE, HOUSTON BOXING ASSOCIATION, INC., HBA, INC., STANLEY HOFFMAN, and RONALD KATZ,
Defendants.

Index No. 11915/88
(Brucia, J.)

ORDER

Defendants Josephine Abercrombie, Houston Boxing Association, Inc., HBA, Inc., Stanley Hoffman and Ronald Katz having moved this Court for an Order pursuant to CPLR 3241(a)(4) and CPLR 3211(a)(7) dismissing the complaint herein;

NOW, on reading and filing the notice of motion of the defendants, dated July 15, 1988, the affirmation of Brian M. Cogan, dated July 14, 1988 and the exhibits thereto, in support of the defendants' motion; the affirmation of Michael M. Perlman, dated August 3, 1988, and the exhibits thereto, in opposition to the defendants' motion; and the reply affirmation of Brian M. Cogan, dated August 9, 1988, in support of defendants' motion, and due deliberation having been had thereon, and the Court having rendered its memorandum decision dated November 4, 1988,

Now, on motion of Meyer, Suozzi, English & Klein, P.C. and Stroock & Stroock & Lavan, attorneys for the defendants, it is hereby

ORDERED that the motion of defendants Josephine Abercrombie, Houston Boxing Association, Inc., HBA, Inc., Stanley Hoffman and Ronald Katz is granted and the complaint is hereby dismissed with prejudice.

ENTER

By: /s/ JAMES J. BUCIA
J.S.C.

Mineola, N.Y.
Dated: December 19, 1988

COUNTY CLERK'S OFFICE, §
STATE OF NEW YORK, § ss.:
COUNTY OF NASSAU §

I, Harold W. McConnell, Clerk of the County of Nassau and of the Supreme and County Courts, Courts of Record, do hereby certify that I have compared the annexed with the original ORDER FILED & ENTERED in my office December 20, 1988 and that the same is a true transcript thereof, and of the whole of such original.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said County and Court May 2, 1989.

/s/ Harold W. McConnell, Clerk

APPENDIX C

H-88-2214

LYNN N. HUGHES

REMANDED TO 157th DISTRICT COURT,
HARRIS COUNTY, 6-30-88

JEA BOXING COMPANY, INC. AND
PINE HILL INVESTMENTS, INC.
D/B/A HOUSTON BOXING ASSOCIATION
Plaintiffs

HBA EAST, LTD., A TEXAS
LIMITED PARTNERSHIP, HBA
EAST, INC., RING NETWORK,
INC., RING SPORTS PROMOTIONS,
INC., ROUND ONE PRODUCTIONS, INC.,
JEFFREY D. LEVINE
Defendants

FUNDS IN REGISTRY

CAUSE
(CITE THE U.S. CIVIL STATUTE UNDER
WHICH THE CASE IS FILED AND
WRITE A BRIEF STATEMENT
OF CAUSE)

28 USC § 1332—contract

Removed from District Court of Harris Cty.

157th J.D. Case #87-10167

ATTORNEYS

H. Dixon Montague, ID #561
VINSON & ELKINS
3200 First City Tower
Houston, Texas 77002-6760

Michael A. Caddell ID #7426
CADDELL & CONWELL
1331 Lamar, Suite 1070
Houston, Texas 77010-3027
(713) 751-0400

TRUE COPY I CERTIFY
ATTEST: JESSE E. CLARK, Clerk

Date	NR	LYNN HUGHES Proceedings
6-27-88	1	PETITION FOR REMOVAL, filed. w/ a) complaint
6-27-88	2	CASH BOND, filed. ($500.00)
6-29-88	3	(LNH) *CONFERENCE MEMORANDUM*, filed. parties ntfd. fs dktd 7/7/88 An order will be entered remanding this case to the 157th District Court, Harris County, Texas. An order will be entered requiring that the $175,000 escrowed funds be deposited in this Court's Registry.
6-29-88	4	(LNH) *ORDER*, filed. parties ntfd. fs. The $175,000 escrowed funds in the adversary proceeding No. 187-0086 *JEA Boxing Company, Inc., et al., v. HBA East, Inc., et al,* in the U.S. Bankruptcy Court of the Eastern District of New York shall be deposited immediately in this Court's registry until a disposition of Cause No. 87-10167 pending in the 157th District Court, Harris County, Texas. dkt'd 7/7/88
6-30-88	5	*ORDER REMANDING THE CASE TO THE 157TH DISTRICT COURT*, filed. parties ntfd. fs dkt'd 7/7/88 dkt'd 7/7/88
6-29-88	6	Pltfs *REQUEST FOR IMMEDIATE HEARING ON PETITION FOR REMOVAL AND REQUEST FOR INJUNCTIVE RELIEF*. filed. fs dkt'd 7/7/88
6-29-88	7	Pltfs *RESPONSE* to Petition for Removal and Request to Remand to State District Court and for Sanctions pursuant to Rule 11 and for Supplemental or alternative injunctive relief. filed. fs dkt'd 7/7/88

Date	NR	LYNN HUGHES Proceedings
7-01-88	8	Pltfs' *MOTION FOR CONTEMPT AND FOR SANCTIONS.* filed. fs dkt'd 7/7/88
7-05-88	9	(LNH) *ORDER TO SHOW CAUSE.* filed. parties ntfd. by mail 7-05-88. fs All Defts named in order are ordered to appear and show cause why they should not be held in contempt of court for failure to comply with this court's Jun 29, 1988 order. Hearing will be: Jul 8, 88, 11 am, Ctrm #7, 11th fl. dkt'd 7/7/88
7-07-88	10	Defts *RESPONSE* to Order to Show Cause. filed. fs dkt'd 7-13-88
7-08-88	11	Non-Party Kaye Scholer *OPPOSITION* to Motion for Contempt and for Sanctions. filed. fs dkt'd 7-13-88
7-08-88	12	Non-Party Kaye Scholer *MOTION FOR RELIEF FROM ORDER.* filed. fs M/D 8/1/88 Dkt'd 7-13-88 br
7-11-88	13	Courtreporter's *TRANSCRIPT* of proceeding held before the Honorable Lynn N. Hughes on Jul. 8, 1988, filed. Dkt'd 7-12-88 br
7-8-88	14	(LNH) *CONTEMPT HEARING,* filed. (Rptr: Fred Warner) Appearances: S. Little & D. Montague—Plft; R. Steoube K. Scholer, F. Hays & Handler Michael Caddell & L. McDonald—defts; K. Scholer, Firman, Hays & Handler has represented that it will deposit the escroed funds in this Court's registry pursuant to this court's Jun. 29, 1988 order. $2,500 atty fees will be assessed as costs; K. Scholer is assessed $1,250 of this amount & the

Date NR LYNN HUGHES Proceedings

defts will be assessed the remaining $1,-250. Plfts will submit order.

Dkt'd 7-18-88 br

7-19-88 15 (LNH) *AMENDED DEPOSIT ORDER*, filed. Parties ntfd. The $175,00 escrowed funds related to the adversary proceedings 187-0086 in the Court in the U.S. Bankruptcy Court of the Eastern district of New York, shall be deposited by Kay, Scholer, Fierman, Hays & Handler immediately in this court's registry f/disposition through 87-10167 pending in the 157th District Court, harris County, Texas. Dkt'd 7-18-88 br

7-19-88 16 (LNH) *JUDGMENT ON CONTEMPT*, filed, Parties ntfd.

1. Respondents, having purged themselves of contempt of court by the conclusion of the hearing, are adjudged liable f/portion of the movant's atty's fees.
2. HBA East, Ltd, HBa East, Inc., Ring Network, Inc., Ring Sports Promotions Inc., Roung One Productions, Inc. & J. D. Levine, jointly & severally, shall pay immediately to JEA Boxing Company, Inc., & Pine Hill Investments, Inc. $1,250; & Kaye, Scholer, Fierman, Hays & Handler shall pay immediately to JEA Boxing Company, Inc. & Pine Hill Investments, Inc., $1,250.

Dkt'd 7-22-88 br

Date	NR	LYNN HUGHES	Proceedings
-11-89	17	(NWB) *ORDER*, entered. Parties ntfd. Ordered that the $175,000, plus all accumulated interest thereon deposited in the Registry of this Court be transferred to the Registry of the 157th Judicial Dist. Court of Harris County, TX under Cause No. 87-010167. kg	
-11-89		Copies of the above order to: Finance, Operations Mgr. kg	

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-88-2214

IN RE: JEA BOXING COMPANY, INC., et al.,
PLAINTIFFS

v.

HBA EAST, LTD., et al.,
DEFENDANTS

OPPOSITION TO MOTION FOR CONTEMPT
AND FOR SANCTIONS

To the Honorable Lynn N. Hughes, United States District Judge:

This opposition is filed on behalf of Kaye, Scholer, Fierman, Hays & Handler ("Kaye Scholer") by its counsel, Akin, Gump, Strauss, Hauer & Feld. Although Kaye Scholer is not a party or an attorney-or-record in the above-entitled and numbered cause of action, it is responding to the Plaintiffs' motion for the reason that relief is requested against Kaye Scholer. In support of this opposition, Kaye Scholer states the following:

1. The relief sought in Plaintiffs' Motion for Contempt and Sanctions cannot be granted by this Court because this Court lacks jurisdiction over the parties and the subject matter. This Court has remanded this case to the 157th Judicial District Court for Harris County, Texas, and, as a result thereof, has been completely divested of

jurisdiction over the case. Moreover, this Court does not have personal jurisdiction over Kaye Scholer with respect to the matters made the subject of Plaintiffs' motion.

2. By Prior Order, this case was remanded to the 157th Judicial District Court for Harris County, Texas, on the ground that this Court lacked subject matter jurisdiction over the case. This Court's remand completely divested the Court of all jurisdiction over the case and all matters therein. *Browning v. Navarro,* 743 F.2d 1069, 1078 (5th Cir. 1984) *reh'g denied,* 747 F.2d 1465. Therein, the Court of Appeals stated "it is axiomatic that remanding a case to state court terminates the jurisdiction of a federal bankruptcy or district court over the case." *Id. See, also In re Providencia Devel. Corp.,* 406 F.2d 251, 253 (1st Cir. 1969).

3. The Plaintiffs' proposed form of "Contempt Order" submitted along with its Motion for Contempt and Sanctions recognizes that a substantial jurisdictional problem exists. Although not requested in this motion, the Plaintiffs have inserted a paragraph in the so-called Contempt Order amending this Court's June 29, 1988 Order, although no cause is stated in the motion for such amendment. Specifically, the Contempt Order proposes to find that "in order to assume compliance of this Court's June 29, 1988 Order, it is necessary to amend its June 30, 1988 Order of remand to retain jurisdiction to assure compliance with its June 29, 1988 Order." Plaintiffs recognize that this Court has been divested of jurisdiction by its prior order. The proposed order goes further and provides for such amendment. Such order is not in compliance with any applicable Rules of Civil Procedure.

* * *

[4]

* * *

. . . to Kaye Scholer's Motion for Relief From Order which is filed contemporaneously with this opposition). The Federal Court in New York does have jurisdiction over the interpleader action pursuant to 28 U.S.C. § 1335. It has jurisdiction over the parties and can adjudicate entitlement to the funds. Therefore, the rights of the parties, including the Plaintiffs, are fully protected by the existence of the interpleader action.

7. Further, and without waiving the foregoing, Kaye Scholer asserts that it cannot be held in contempt of the June 29, 1988 Order. No term or provision of the June 29, 1988 Order is sufficiently specific with respect to Kaye Scholer or either civil or criminal contempt to be found.

8. For the foregoing reasons, Plaintiffs' motion cannot be considered by this Court and should be dismissed. Alternatively, if the Court does consider Plaintiffs' motions, the relief with respect to Kaye Scholer should be denied in all respects.

Respectfully submitted this 8th day of July, 1988.

KAYE, SCHOLER, FIERMAN,
HAYS & HANDLER

By: /s/ H. REY STROUBE, III
H. Rey Stroube, III
Admissions No. 4673
Akin, Gump, Strauss, Hauer
& Feld
3200 RepublicBank Center
Houston, Texas 77002
(713) 221-0101

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

C.A. NO. H-88-2214

JEA BOXING COMPANY, INC., et al.,
Plaintiffs,

v.

HBA EAST, LTD., et al.
Defendants.

RESPONSE TO ORDER TO SHOW CAUSE

COMES NOW, HBA East, Inc., Ring Network, Inc., Ring Sports Promotions, Inc., Round One Production, Inc. and Jeffrey D. Levine, Defendants in the above-entitled and numbered cause of action and makes this their Response to the Court's Order to Show Cause why they should not be held in contempt of court for failure to comply with this Court's June 29, 1988, Order and would show as follows:

I.

The Escrow Account

1.1 On June 29, 1988, this Court signed an order that $175,000.00 of escrowed funds (the "Escrowed Funds") in Adversary Proceeding No. 187-0086, *JEA Boxing Company, Inc., et al v. HBA East, Inc., et al,* In the United States Bankruptcy Court of the Eastern District of New York (the "Bankruptcy Proceeding"), be deposited immediately into this Court's Registry.

* * *

[4-5]

* * *

IV.

Lack of Federal Jurisdiction

4.1 The attempted removal of this action was based upon diversity of citizenship under Title 28 U.S.C. § 1441. When such an attempted removal occurs, the District Court's jurisdiction is limited to a determination of its own jurisdiction and the power to remand the action to the State Court if it appears that the action was removed improvidently and without jurisdiction. *Smith v. Dealers Transit Inc.*, 239 F.Supp. 605 (E.D. N.D. Tenn. 1965). In the *Smith* case, the Court held, on facts similar to our own, that since the necessary allegations as to diversity of citizenship between the parties did not appear from the respective records before the Court, that the Court had no jurisdiction to take any action other than a remand of the case back to State Court. *Smith* at 607.

4.2 In an earlier opinion, a South Carolina District Court held that:

> Unless the case has been properly removed, this Court has no jurisdiction to decide other questions.

Hensley v. Green, 36 F.Supp. 671, 672 (W.D. S.C. 1940).

4.3 Essentially, a District Court can not gain jurisdiction over an action unless there is some basis under 28 U.S.C. §§ 1441-1452. There is no basis in this case for Federal jurisdiction under the appropriate sections. Therefore, the Court's only power is to remand the case for determination in the appropriate forum. It is beyond

the jurisdictional powers of this Court to enter an order for the transfer of funds because such an order is beyond the scope of its narrow jurisdictional power to remand a case upon which no Federal jurisdiction lies.

WHEREFORE, PREMISES CONSIDERED, Defendants Jeffrey D. Levine, HBA East, Inc., Ring Network, Inc., Ring Sports Promotions, Inc. and Round One Productions, Inc. respectfully request this Court to find them not in contempt of Court for failure to comply with the Court's June 29, 1988, Order.

Respectfully submitted,

CADDELL & CONWELL

By: /s/ LESLIE McDONNELL
Michael A. Caddell
Federal ID No. 7426

Leslie McDonnell
Federal ID No. 9136

The Park in Houston Center
1331 Lamar, Suite 1070
Houston, Texas 77010
(713) 751-0400

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Response to Show Cause Order has been forwarded to all counsel of record via certified mail, return receipt requested, on this 7th day of July, 1988.

By: /s/ LESLIE McDONNELL
Leslie McDonnell

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

C.A. NO. H-88-2214

Houston, Texas, July 8, 1988, 8:30 a.m.

JEA BOXING COMPANY, INC., AND PINE HILL INVESTMENTS, INC., D/B/A HOUSTON BOXING ASSOCIATION

Versus

HBA EAST, LTD, A TEXAS LIMITED PARTNERSHIP, et al.

TRANSCRIPT OF HEARING
BEFORE THE HONORABLE LYNN N. HUGHES
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff:	Mr. H. Dixon Montague Vinson & Elkins 3200 First City Tower Houston, Texas 77002
For Kaye-Scholer:	Mr. Rey Stroube Akin, Gump, Strauss, Haver & Feld 700 Louisiana Houston, Texas 77002
For Jeffrey Levine:	Mr. Michael A. Caddell Ms. Leslie McDonnell Caddell & Conwell 1331 Lamar, Suite 1070 Houston, Texas 77010
Court Reporter:	Fred Warner 515 Rusk Avenue Houston, Texas 77002

Proceedings recorded by mechanical stenograph, produced by computer-aided transcription.

* * *

[14-15]

* * *

[Mr. Caddell:]
removal was something, that the sole reason for the removal was not to allow disbursal of the funds at 5:00 o'clock on Wednesday.

If you remember, on Wednesday when we discussed this matter, I represented that I was certain that the Kaye-Scholer firm would not make a disbursement if you simply told them to hold onto the fund, that they had complied with the Court's order in New York and they had not disbursed funds.

I was only distressed after you spoke on the telephone with Mr. Steinberg and advised him to send the funds from New York to Texas.

What drives the defendants in New York, I believe, the clients in New York is a fear, frankly, of being in Texas state court. I don't believe that is a reasonable fear. I don't know that it's rational, but they would like to take advantage of the opportunity to be in federal court afforded them by the constitution. They believe that the diversity jurisdiction exists.

I researched it and, frankly, Judge, I still believe diversity jurisdiction exists. I believe HBA East Ltd. is a sham defendant.

THE COURT: I listened to all that at some length on Wednesday.

MR. CADDELL: I understand.

have I?

THE COURT: I haven't signed the remand order.

MR. CADDELL: Yes. You signed it June 30, which remanded the case to state court.

Some of the case law we have, I cited 743 fed. 2d 1069, Brown versus Navarro, 1079. I have highlighted what I think are the relevant portions.

MR. MONTAGUE: Do you have a copy of that for me, counsel?

MR. CADDELL: That's my only copy. I don't have a copy for myself now.

The concern I have is the idea of removing the case to federal court is not a new idea. This did not spring forth from Mr. Steinberg's fertile imagination, you know. Monday, the 27th or whatever it was of July—I mean, June, when he got Judge Felder's order saying you have until 5:00 o'clock.

In fact, they had asked Judge Felder to make a decision concerning the ability of the defendants to remove this case from state court to federal court. They wanted very much to be in federal Court.

THE COURT: I can't help if they asked Judge Felder to rule on a remand that hadn't happened that he couldn't rule on in any event. Judge Felder has no order to decide whether a case should be remanded.

MR. CADDELL: Whether it could be removed.

THE COURT: He can't decide. The best he could do is

* * *

[31-32]

* * *

[Mr. Caddell:]
and jurisdiction granted the Federal Court Judge is broad,

very broad. It is not unlimited. We have presented case law to the Court which suggests that this is not the appropriate forum for the Court's order of last Wednesday and this hearing, and while I have seen New York law—

THE COURT: You haven't shown me any authority. I cannot hold a hearing with contumatious behavior on the order of this Court. I am not trying to litigate the underlying merits of the lawsuit.

MR. CADDELL: There is ample authority that failure to obey a void order is not contumatious behavior. An order without jurisdiction is a void order. It is not voidable. It is void.

THE COURT: I had jurisdiction when I offered it, and I am convinced I still have jurisdiction to keep your bandits from running off with the money.

I don't think there is a slightest doubt that I have the authority to freeze control of the race while the bad faith meritless machinations of your clients are returned to their proper home, any more than Judge Felder didn't have authority to keep the money held under his order after he dismissed the bankruptcy.

He knew a skunk when he saw one, and we are just as street wise here as they are in Brooklyn. There is no question that the only reason I entered the extraordinary relief I did is because it became abundantly clear to me in the hearing last Wednesday that your clients and your client now, as an agent for his clients, had no intention of complying without trying to come up with some other gimmick. They don't want to litigate the merits. They are trying to obstinate, run up the expenses.

The partner to whom I talked with at Kaye-Scholer yesterday kept arguing that it really was inconvenient for the defendants to litigate down here. I don't doubt that's true, but that's something that should have been addressed to Judge Salazar, addressed to me during my participation but not approached by saying, that's okay. We cured it. We did what you really wanted, Judge. We filed another lawsuit in New York. That's what you really wanted.

If I had really wanted that I would have said that's what I wanted them to do. I didn't.

I, in person, order Steinberg to deliver the money to the registry of this Court.

Mr. Stroube do you have any evidence that it was not absolutely possible to have been done? Did he have a heart attack and couldn't write the check?

MR. STROUBE: Your Honor, I have talked to two people. One of them was not Mr. Steinberg. I talked to the gentleman who I believe you were talking to yesterday, Mr. Frencaso, not Mr. Steinberg. I don't know the disposiiton of Mr. Steinberg,

* * *

[certification]

* * *

CERTIFICATION

I, FRED WARNER, Official Court Reporter for the United States District Court for the Southern District of Texas, Houston Division, do hereby certify that the foregoing pages 1 thtrough 58 are a true and complete transcript of the proceedings had in the above-styled and numbered cause before the Honorable LYNN N. HUGHES, United States District Judge, on the 8th day of July, 1988.

WITNESS MY OFFICIAL HAND at my office in Houston, Harris County, Texas on this the 11th day of July, A.D. 1988.

By: /s/ FRED WARNER
Fred Warner, CSR
Official Court Reporter

APPENDIX F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

July 19, 1988

The Honorable Felix Salazar, Jr.
Judge, 157th District Court
Harris County Civil Courts Building
301 Fannin Street
Houston, Texas 77002

Re: No. 87-010167
157th District Court
Civil Action No. H-88-2214
United States District Court
Southern District of Texas

Dear Judge Salazar:

Now that the case is again fully pending before you, it appears to me that the sensible thing is for me to transfer the $175,000 plus interest I hold in the registry to your registry, subject to all the claims that are eventually asserted.

If you concur, I will sign a disbursement order as soon as I receive a copy of your order authorizing the deposit. If you do not concur, I will abide your disposition of the funds.

With best wishes,

Yours very truly,
By: /s/ LYNN N. HUGHES
Lynn N. Hughes

Copies: Mr. H. Dixon Montague
Mr. H. Rey Stroube, III
Mr. Michael A. Caddell

PLAINTIFF'S EXHIBIT #8

APPENDIX G

THE SUPREME COURT OF TEXAS
P.O. Box 12218 Capitol Station
Austin, Texas 78711

March 27, 1989

TO WHOM IT MAY CONCERN:

I CERTIFY THAT I, Mary M. Wakefield, am custodian of the membership rolls of the Supreme Court of Texas and

I HEREBY CERTIFY THAT according to the records of the Supreme Court of Texas Arthur Steinberg has never been licensed to practice law in Texas.

By: /s/ MARY M. WAKEFIELD
Mary M. Wakefield, Clerk
Supreme Court of Texas

MMW/km

PLAINTIFF'S EXHIBIT #11